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JURISDICTION AND PRACTICE  
OF  
FEDERAL COURTS

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WILLIAMS



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# Jurisdiction and Practice of Federal Courts

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A Handbook for Practitioners and Students

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By  
Charles P. Williams, M. A.  
of the St. Louis Bar

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**DEDICATION**

**THIS BOOK IS INSCRIBED TO  
MR. CHARLES W. BATES.**

**AS**

**A SLIGHT EVIDENCE OF ADMIRATION  
AND REGARD**



## PREFACE

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This book has for its basis the lectures upon Federal Jurisprudence prepared, at various times during the last four years, for the Law School of Washington University.

In undertaking to deal with the subject, I was unable to lay my hands upon any text which seemed to me to embody, within a short compass, what I regarded as essential. I do not believe the subject can be covered, within the time ordinarily allotted, by the study of cases.

I am perfectly aware of the fact that no law-book can ever hope to realize the high aim set by Thucydides before his histories—to be a possession forever; and least of all a book upon this subject. Nevertheless, I am persuaded that, for the main purpose intended, the book has at least temporary and even permanent value: that purpose being to set briefly before the ordinary practitioner (and the student) a clear *conspectus* of Jurisdiction, together with the most important points of Practice.

I have tried to write, so far as the subject permitted, something more than a mere digest, although this necessarily involved something less. Some things had to be omitted; for example, Bankruptcy, which is almost a detached universe in itself.

The table of cases has been prepared by Miss Alice Martin, to whom I am under very great obligation for such service.

I feel bound to express my gratitude to Mr. Arthur B. Shepley, in particular, as well as to many other friends who have discussed with me, at occasional great sacrifice of their time and attention, certain phases of the subject with which I was unfamiliar; although neither he nor they ought to be charged with any responsibility for my statements or conclusions.

CHARLES P. WILLIAMS.

St. Louis, Missouri, Feb. 1, 1917.





# TABLE OF CONTENTS

---

## CHAPTER I.

### SOURCE AND DISTRIBUTION OF JURISDICTION.

- § 1. Judicial Power—Political and Moot Questions—Division of Powers.
- 2. Constitutional Grant—Immunity of State.
- 3. When Suit is Against State.
- 4. "Extend"—"Cases"—"Controversy."
- 5. Necessity for National Judiciary—Jurisdiction Over Whole Case.
- 6. In What Cases Federal Jurisdiction Exclusive.
- 7. Two Great Classes of Federal Jurisdiction.
- 8. Admiralty Jurisdiction—Saving of Common Law Remedy.
- 9. Cases Arising Under Patent, etc., Laws—Federal and State Jurisdiction.
- 10. Bankruptcy—Jurisdiction of State and Federal Courts.
- 11. Supreme Court—Original and Appellate Jurisdiction.
- 12. Organization of Courts—Limited but not Inferior—Courts Enumerated.

## CHAPTER II.

### DISTRICT COURTS—TERRITORIAL ASPECTS.

- § 1. Creation of District Courts—Divisions.
- 2. Power of Courts Limited to Territorial Sovereignty.
- 3. Jurisdiction of a District Court not Coincident with National Boundaries.
- 4. Venue of Suits in District Courts.
- 5. Waiver of Venue—"Plaintiff" and "Defendant" Used Collectively.
- 6. Dispensability of Party—Statute.
- 7. Dispensability of Party—Rule of Court.
- 8. Actions of a Local Nature.

## TABLE OF CONTENTS.

9. Lien Upon or Claim to Property in District—Publication.
10. Property in Two Districts—Transfer Between Divisions.
11. District Ordinarily Limit to Exercise of Jurisdiction—Exceptions.
12. Personal Presence in District—Process on Corporations.
13. Corporation Must be Doing Business in State.
14. Service Upon Foreign Corporations.
15. Doing Business—What Amounts to.
16. Service on Agents—State Statutes.
17. Doing Business and Service on Agent in District Necessary.

## CHAPTER III.

### DISTRICT COURTS—SUBJECT-MATTER OF JURISDICTION.

- § 1. The Classification of the Jurisdiction.
2. Civil Proceedings By or Against the United States or An Officer Thereof.
  3. Crimes, Penalties and Forfeitures.
  4. Commerce and Immigration.
  5. Revenue and Duties.
  6. Governmental Privileges.
  7. Civil Rights.
  8. Admiralty, Prize and Seizures.
  9. Miscellaneous Instances.
  10. Assignment—Exceptions to Limitation.
  11. Assignment—Chose in Action.
  12. Who Are Assignees—Pleading and Proof.
  13. Suits Arising Under Constitution, etc. Opening Pleading Must Show.
  14. Cases Under Constitution, Laws or Treaties—Real Involution—Dismissal.
  15. Federal Corporations—Federal Officers.
  16. Diverse Citizenship—What Constitutes.
  17. Diverse Citizens—Corporate Bodies.
  18. Diverse Citizens—Consolidated or Domesticated Corporations.
  19. The Same—Continued.
  20. The Same—Continued.
  21. Diverse Citizens—Partnerships—Boards, etc. Suit By Stockholder.
  22. Diverse Citizens—Real and Nominal Parties.
  23. Diverse Citizens—Fraudulent Transfers and Removals.

## TABLE OF CONTENTS.

### CHAPTER IV.

#### DISTRICT COURTS—SUBJECT MATTER OF JURISDICTION—CONTINUED.

- § 1. Diversity Between Really Opposite Parties to Be Complete—  
Realignment.
- 2. Initial Diversity Intended—May Appear From Any Part of  
Record—Amendment of Record to Show.
- 3. Original Jurisdiction in District Court When State Is Party—  
Aliens—Aliens and Citizens.
- 4. Ancillary Jurisdiction.
- 5. Ancillary Jurisdiction—Property in Actual or Potential Pos-  
session.
- 6. Remedies to Recover Property.
- 7. Ancillary Jurisdiction—Record and Processes to Enforce  
Judgments.
- 8. Classification Illustrative—Ancillary Instances at Law.
- 9. Ancillary Instances in Equity.
- 10. Suits Against Receivers.
- 11. Amount in Controversy—Law and Equity.
- 12. Amount in Controversy—Suits at Law.
- 13. Amount in Controversy—Suits at Law.
- 14. Amount in Controversy—Suits in Equity—Plaintiffs.
- 15. The Same—Illustrations.
- 16. The Same—Illustrations—Creditors' Suits.
- 17. The Same—Defendants.
- 18. The Same—Difficulty of Applying Tests.
- 19. Amount in Controversy—Estimation of Subject Matter.
- 20. Amount in Controversy—Things Inestimable—Amount How  
Shown—Fictitious Valuation—Change in Value.
- 21. Amount Must Be Directly Involved—Joining Claims.

### CHAPTER V.

#### DISTRICT COURT—REMOVAL OF CAUSES.

- § 1. Nature of Removal Proceedings—Instances Cited.
- 2. Removal of Causes—Subordinate Instances.
- 3. Must Be "Suit."
- 4. Suit Must Have Separate Identity As Such.
- 5. Involves Judicial Proceeding—Not Administrative.
- 6. Must Be of Civil Nature.

## TABLE OF CONTENTS.

7. Must Be Within Original Jurisdiction—State Cannot Defeat By Imposing Peculiar Methods.
8. Amount in Removal Cases—Counter Claims—Change.
9. Venue in Removal—Waiver.
10. Removal—Federal Question—Opening Pleading—Joining Federal Corporation—Employers' Liability.
11. Real and Nominal Parties—Initial and Continuous Diversity Required—Aliens.
12. Realignment of Parties—Necessary Parties—False Averment of Citizenship.
13. Removal of Causes—Joinder of Applicants—Substituted Parties.
14. Separable Controversies—Aliens—Determined By Face of Complaint—Fraud.
15. Charge of Joint Liability—General Tests for Separability—State Laws Generally Applied.
16. How Fraudulent Joinder Attacked—Trial—Motive.
17. Removal of Separable Controversy Removes Whole Case.

## CHAPTER VI.

### DISTRICT COURT—REMOVAL OF CAUSES—CONTINUED.

- § 1. Method of Removal—Federal Question—Diverse Citizens.
2. Petition for Removal Matter of Record—State Court Limited to Record—Remedies for Denial.
3. Restoration of State Court's Jurisdiction—Waiver and Estoppel.
4. Time for Removal—Waiver and Estoppel.
5. Filing Transcript—Notice of Application to Remove.
6. Amending Petition—Remanding—No Review.
7. Effect of Removal.
8. Removal for Local Prejudice—Statute.
9. Does Not Apply to Separable Controversies.
10. Local Prejudice Merely Extends Time to Remove.
11. Local Prejudice—Method of Removal.
12. Method of Transfer—Trial—Remand—No Review.
13. Total Diversity Required—Aliens—Policy of Act.
14. Removal in Civil Rights Cases—Nature.
15. Civil Rights—Removal of Criminal Prosecutions.
16. Removal of Proceedings Against Revenue Officers—Officers of Congress—of U. S. Courts.
17. Claims of Land Under Different States.
18. Right of Removal—State Restrictions.

## TABLE OF CONTENTS.

### CHAPTER VII.

#### PROCEDURE AT LAW.

- § 1. General Considerations.
- 2. Rules of Court—Binding Character.
- 3. Statutory Authority to Enact Rules—Conformity Act.
- 4. Statutory Powers Continued—The Rules Enacted by the Supreme Court.
- 5. Interpretation of Conformity Act—Judicial Discretion.
- 6. Unimpaired Powers of the Judge.
- 7. No Application to Structure, Jurisdiction or Relationship to Other Federal Courts—Equitable Defenses.
- 8. Proceedings Controlled by Conformity Act.
- 9. Evidence—Competency of Witnesses.
- 10. Mode of Proof—Depositions—Physical Examination.
- 11. Order of Proof—Cross Examination Confined to Direct.
- 12. Production of Books and Papers—Subpoena Duces Tecum.
- 13. Trial By Jury—Waiver—Peculiar Original Result.
- 14. Written Waiver By Statute—Arbitrators—Auditors—Statutory Reference.
- 15. Jury Composition—Direction of Verdict—Judgment Non Obstante.
- 16. Charge of Court—Exceptions Should Be Specific.
- 17. Amendments.
- 18. Attachments—Executions.
- 19. Stay of Execution—Motion for New Trial—Abuse of Discretion.

### CHAPTER VIII.

#### THE RULE OF DECISION AT LAW.

- § 1. Conflict of Rules of Decision Between State and Federal Courts.
- 2. General Considerations—No Federal Common Law.
- 3. The State Courts Follow U. S. Supreme Court in Federal Matters.
- 4. The Federal Doctrine of General Jurisprudence.
- 5. Application of R. S. 721.
- 6. The Basis for the Conflict.
- 7. Rules of Comity As to State Statutory Provisions.
- 8. Rules of Local Property.
- 9. General Jurisprudence—What Is.
- 10. Local Rules of Property—Examples.

## **TABLE OF CONTENTS.**

### **CHAPTER IX.**

#### **THE EQUITY JURISDICTION.**

- § 1. Statutory Distinctions.
- 2. Is Equity a Uniform Law?
- 3. Distinction Between Law and Equity.
- 4. Effect of the Distinction—No Federal Substantive Equity.
- 5. Substantive Law and Procedure Distinguished.
- 6. The Same.
- 7. Statutory Extensions of Equity Jurisdiction.
- 8. Equity in Federal Courts Must Follow Analogy of Law.
- 9. Federal Court Must Respect the Right—Cases Analyzed.
- 10. Adequate Remedy at Law.
- 11. Injunctions to Stay State Courts—Problem Stated.
- 12. The Rule of Priority—Its Limitations.
- 13. Injunctions to Enforce Rightful Priority.
- 14. Injunctions By State Courts—Administrative Proceedings.
- 15. Limitations on Issue of Injunctions.
- 16. The Same—Labor Cases.

### **CHAPTER X.**

#### **EQUITY PROCEDURE.**

- § 1. The New Equity Rules.
- 2. Proceedings as of Course.
- 3. Parties—Fundamental Rules.
- 4. Plaintiffs—Real Party in Interest.
- 5. Right of Representation—State Laws.
- 6. Representation—Class Suits.
- 7. Joinder of Plaintiffs.
- 8. Joinder of Defendants.
- 9. Indispensable and Necessary Parties.
- 10. Proper Parties.
- 11. Formal or Nominal Parties—Criticism.
- 12. Rules Dispensing With Parties.
- 13. Objection for Want of Parties.
- 14. Incompetent Parties.
- 15. Intervention—Origin.
- 16. Intervention—Two Aspects.
- 17. Who May Intervene as Party.
- 18. Method of Intervention—Meaning of "In Harmony With."

## TABLE OF CONTENTS.

### CHAPTER XI.

#### EQUITY PROCEDURE—CONTINUED.

- § 1. The Bill—Joinder of Actions.
- 2. Stockholders' Bills.
- 3. Signature—Filing—Process.
- 4. Methods of Defense—Demurrers and Pleas Abolished.
- 5. Defense of Matter Apparent—Setting Down Motion.
- 6. One Answer to Raise All Defenses—Jurisdiction of Person.
- 7. Answer—Contents.
- 8. Counter Claims—Two Classes—Scope of.
- 9. The Counter Claim of the Second Class.
- 10. Counter Claim of Second Class—Jurisdiction.
- 11. Reply—Answer to Counter Claim—Motion.
- 12. Indefiniteness—Impertinence—Transfer to Law Side—Legal Incident.
- 13. Amended and Supplemental Pleadings.
- 14. Trial—Exclusion of Evidence—Method of Eliciting.
- 15. Discovery By Interrogatories.
- 16. Interrogatories—Subject Matter—Effect.
- 17. Depositions—Rules.
- 18. Depositions—Methods of Taking.
- 19. Affidavits.

### CHAPTER XII.

#### EQUITY PROCEDURE—CONCLUDED.

- § 1. Setting Down for Trial—Continuance.
- 2. Master—Reference Unusual.
- 3. Proceedings Before Master—Report.
- 4. Exceptions to Report.
- 5. Decrees *Pro Confesso*—Setting Aside.
- 6. Right to Be Heard After Decree *Pro Confesso*.
- 7. Form of Decree—Performance—Clerical Errors.
- 8. Motion for Rehearing.
- 9. Bill of Review—Time for Refiling—Leave.
- 10. Injunctions—Who May Grant.
- 11. Restraining Orders—Preliminary Injunctions—Notice—Bond—Continuation Pending Appeal.
- 12. *Ne Exeat*.
- 13. Affirmations—Computation of Time—Additional Rules.



## TABLE OF CONTENTS.

### CHAPTER XIII.

#### CRIMINAL LAW.

- § 1. Source of Power—No Common Law Crimes.
- 2. State and Federal Sovereignty Respecting Crime.
- 3. Territorial Offenses.
- 4. High Seas—Admiralty Jurisdiction—Forts and Public Buildings—Islands.
- 5. The Criminal Code.
- 6. Criminal Procedure—Common Law—State Laws.
- 7. Arrest Without Warrant—Who May Issue Warrant.
- 8. Arrests and Preliminary Examinations.
- 9. Bail—Commitment for Removal—Order of Removal—*Habeas Corpus*.
- 10. Indictment—Infamous Crimes.
- 11. Venue.
- 12. Grand Jury—Composition—Inquisitorial Function.
- 13. Charging the Offense—Bill of Particulars.
- 14. Defects of Form.
- 15. Information Must Be Supported, When.

### CHAPTER XIV.

#### CRIMINAL LAW—CONTINUED.

- § 1. Distinct Offenses Not to Be Included in Count—Exceptions.
- 2. Joinder of Counts—R. S. 1024.
- 3. Manner of Objection to Indictment—Defects in Grand Jury.
- 4. Duplicity—Misjoinder.
- 5. Motions to Quash—Demurrers—*Respondat Ouster*.
- 6. Arraignment—Entering Plea.
- 7. Severance—Continuance—Assigning Counsel—Copy of Indictment—List of Jurors and Witnesses.
- 8. Jury Trial—"Serious" and "Petty" Offenses.
- 9. Jurors—Impanelling—Challenge.
- 10. Rights of Confrontation—Exceptions—Depositions for Defendant.
- 11. Rules of Evidence—Original States.
- 12. The Same—New States.
- 13. Self-Incrimination.
- 14. The Immunity Afforded by Statute.
- 15. Searches and Seizures.

## TABLE OF CONTENTS.

### CHAPTER XV.

#### CRIMINAL LAW—CONTINUED.

- § 1. Objections to Evidence.
- 2. Order of Proof—Examination of Witnesses.
- 3. Direction of Verdict—Review.
- 4. The Charge—Objections and Exceptions.
- 5. The Verdict.
- 6. The Motion for New Trial.
- 7. Motion in Arrest.
- 8. The Sentence.
- 9. The Review By Writ of Error.
- 10. *Supersedeas*.
- 11. Bail.

### CHAPTER XVI.

#### ADMIRALTY JURISDICTION.

- § 1. Early History.
- 2. The Extent of the Grant.
- 3. Scope and Inclusion of the Jurisdiction.
- 4. The Power to Change the Admiralty Law.
- 5. The Legislative Power of the States.
- 6. The Admiralty Lien.
- 7. Catalogue of Jurisdiction—Tort and Contract—Locality.
- 8. Locality—Land or Water.
- 9. Locality—Must the Tort Be Maritime?—Death.
- 10. Principal Contracts—Building Contracts—Supplies—State Laws Conferring Liens.
- 11. Seamen's Contracts—Affreightment—Towage—Pilotage—Passengers.
- 12. Bottomry—Tolls—Wharfage—Consortship—Stevedorage.
- 13. Salvage—General Average—Demurrage.
- 14. Petitory and Possessory Actions.
- 15. Seizures—Survey and Sale.
- 16. Limitation of Liability.
- 17. Restraints Upon the Jurisdiction.

### CHAPTER XVII.

#### ADMIRALTY PRACTICE.

- § 1. Source of Practice—Rules—Practice Liberal.
- 2. Parties Plaintiff—Real Parties in Interest.
- 3. Apparent Legal Titles.

## TABLE OF CONTENTS.

4. Representation.
5. Joinder of Plaintiffs.
6. Defendants.
7. Joinder.
8. Claim and Intervention.
9. Instances of Intervention
10. Claim and Defense.
11. The Libel.
12. Stipulations for Security—Poor Persons—Mariners.
13. Process.
14. Stipulations by Way of Bail.
15. Process Against *Res*—Perishable Property—Stipulations.

## CHAPTER XVIII.

### ADMIRALTY PRACTICE—CONCLUDED.

- § 1. Appearance and Default.
2. Local Practice.
  3. Decree *Pro Confesso*—Hearing.
  4. Defense.
  5. Conflicting Terminology.
  6. Exceptions—Exceptive Allegations.
  7. Objection to Jurisdiction.
  8. Requirements of Exceptions.
  9. The Answer.
  10. Set Off—Cross Libel.
  11. Rule 59—Bringing in Additional Parties.
  12. No Replication Necessary—Amendments of Libel to Confess and Avoid.
  13. Amended and Supplemental Pleadings.
  14. The Trial—Provisions for Jury—Commissions.
  15. Appeals.
  16. Appeals—Hearing *De Novo*.
  17. Proceedings for Appeal.

## CHAPTER XIX.

### THE COURTS OF APPELLATE JURISDICTION.

- § 1. Two Appellate Courts—The Statutes.
2. The Supervisory Control of the Supreme Court Over Courts of Appeals.
  3. "Where Jurisdiction Is in Issue."
  4. The Same—Final Judgments Only—Two Appeals.

## TABLE OF CONTENTS.

5. Jurisdiction in Issue—Respective Jurisdiction of the Appellate Courts.
6. Necessity of Certificate.
7. Constitutional Questions.
8. The "Controlling" Doctrine.
9. The Doctrine That an Appellant Cannot Allege Error in His Own Favor.
10. The Constitutional Question Must be Real.
11. Constitutional Question Gives Complete Jurisdiction—No Amount Necessary.
12. When Judgments of C. C. A. Final.
13. Appeal to Supreme Court Under Special Statutes.
14. Certiorari to C. C. A. by the Supreme Court.
15. Criminal Cases.

## CHAPTER XX.

### APPEALS AND ERROR—DECISIONS REVIEWABLE.

- § 1. Appeal and Error—Distinction Practically Destroyed for Some Purposes.
2. Final Judgments—Definitions.
  3. Severability of the Lis for Purposes of Review.
  4. The Same.
  5. The Same—Joint Claims.
  6. The Same—Severability of Particular Matters.
  7. Cross Bills—Petitions to Remove—Other Judgments Not Final.
  8. Difficulty in Distinguishing Judicial and Ministerial.
  9. Finality—Orders by Judge—Conception Below—Conditions.
  10. Appellate Judgments.
  11. Motions for Rehearing Defer Finality.
  12. Appeals From Interlocutory Judgments.
  13. The Same.

## CHAPTER XXI.

### APPELLATE PROCEDURE—LAW AND EQUITY.

- § 1. Similarity of Rules for Appeal and Error.
2. The Scope of the Two Processes.
  3. The Record—Exceptions—Preservation of.
  4. Making Up the Bill.
  5. Sealing and Signing—By What Judge.

## TABLE OF CONTENTS.

6. Time for Filing Bill.
7. The Same—Term Bill.
8. May be Filed After Error Sued—Recitations of Extension.
9. Exceptions in Equity.
10. Petition for Writ of Error—Allowance.
11. Petition for Allowance of Appeal—Allowance.
12. Whether Allowed as of Right—Continuations of Litigation  
—Necessity for Summons and Severance.
13. Summons and Severance.
14. Persons Who May Appeal or Bring Error.

## CHAPTER XXII.

### APPELLATE PROCEDURE, LAW AND EQUITY— CONTINUED.

- § 1. The Assignment of Errors.
2. Their Definiteness.
  3. Bond—Supersedeas.
  4. The Amount of the Bond—No Bond from U. S.
  5. Citation—Waiver.
  6. Citation on Appeal.
  7. The Rules as to Citation in *Jacobs v. George*.
  8. Service of Citation—What Judge Should Sign.
  9. Issuance and Service of Writs of Error.
  10. Limitation of Time—"Taken" or "Sued Out."
  11. The Transcript—Law and Equity—Docketing—Dismissal for  
Failure.
  12. Extreme Limitations for Filing Transcript—Entry of Appearance.
  13. The Transcript—"Old" and "New" Methods.

## CHAPTER XXIII.

### DECISIONS OF STATE COURTS—FEDERAL REVIEW.

- § 1. The Statute—Amendments—Review.
2. What Judgments are Final.
  3. The Judgment Must be of the Highest State Court Where  
Decision Could be Had.
  4. "Drawn in Question" and "Specially Set Up."
  5. The Difference Attempted to be Explained.
  6. Obscuration of Distinction—Question Decided Below.

## TABLE OF CONTENTS.

7. Motion for Rehearing.
8. Further Obscuration.
9. How Questions Must be Raised—State Practice—Effect of Certificate.
10. Federal Question Must be Substantial.
11. Must be Controlling.
12. The Scope and Reach of the Writ of Error.
13. Validity, Rather Than Construction—"Authority."
14. Reason for *Certiorari*.

## CHAPTER XXIV.

### FEDERAL REVIEW OF STATE COURTS—THE PROCEDURE.

- § 1. The Writ of Error—Conformity With Federal Practice.
2. Must Be Allowed—By Whom.
  3. Petition for Writ—Summons and Severance.
  4. The Assignment of Errors.
  5. The Allowance of the Writ.
  6. The Citation.
  7. The Bond.
  8. Supersedeas—Limitation of Time.
  9. Issue of Writ—To Whom Directed.
  10. The Record and Transcript.
  11. Summary of Procedure to Obtain Writ.
  12. Review by *Certiorari*.

## TABLE OF CONTENTS.

6. Time for Filing Bill.
7. The Same—Term Bill.
8. May be Filed After Error Sued—Recitations of Extension.
9. Exceptions in Equity.
10. Petition for Writ of Error—Allowance.
11. Petition for Allowance of Appeal—Allowance.
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## CHAPTER XXII.

### APPELLATE PROCEDURE, LAW AND EQUITY— CONTINUED.

- § 1. The Assignment of Errors.
2. Their Definiteness.
  3. Bond—Supersedeas.
  4. The Amount of the Bond—No Bond from U. S.
  5. Citation—Waiver.
  6. Citation on Appeal.
  7. The Rules as to Citation in *Jacobs v. George*.
  8. Service of Citation—What Judge Should Sign.
  9. Issuance and Service of Writs of Error.
  10. Limitation of Time—"Taken" or "Sued Out."
  11. The Transcript—Law and Equity—Docketing—Dismissal for Failure.
  12. Extreme Limitations for Filing Transcript—Entry of Appearance.
  13. The Transcript—"Old" and "New" Methods.

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### DECISIONS OF STATE COURTS—FEDERAL REVIEW.

- § 1. The Statute—Amendments—Review.
2. What Judgments are Final.
  3. The Judgment Must be of the Highest State Court Where Decision Could be Had.
  4. "Drawn in Question" and "Specially Set Up."
  5. The Difference Attempted to be Explained.
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## TABLE OF CONTENTS.

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### FEDERAL REVIEW OF STATE COURTS—THE PROCEDURE.

- § 1. The Writ of Error—Conformity With Federal Practice.
2. Must Be Allowed—By Whom.
3. Petition for Writ—Summons and Severance.
4. The Assignment of Errors.
5. The Allowance of the Writ.
6. The Citation.
7. The Bond.
8. Supersedeas—Limitation of Time.
9. Issue of Writ—To Whom Directed.
10. The Record and Transcript.
11. Summary of Procedure to Obtain Writ.
12. Review by *Certiorari*.





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- § 1. Judicial Power—Political and Moot Questions—Division of Powers.
2. Constitutional Grant—Immunity of State.
  3. When Suit is Against State.
  4. "Extend"—"Cases"—"Controversy."
  5. Necessity for National Judiciary—Jurisdiction Over Whole Case.
  6. In What Cases Federal Jurisdiction Exclusive.
  7. Two Great Classes of Federal Jurisdiction.
  8. Admiralty Jurisdiction—Saving of Common Law Remedy.
  9. Cases Arising Under Patent, etc., Laws—Federal and State Jurisdiction.
  10. Bankruptcy—Jurisdiction of State and Federal Courts.
  11. Supreme Court—Original and Appellate Jurisdiction.
  12. Organization of Courts—Limited but not Inferior—Courts Enumerated.

§ 1. Judicial Power—Political and Moot Questions—Division of Powers.—The federal government framed by our political fathers is one of limited powers, and the strong tendency of the author of these lectures has been toward strict construction as the real salvation of a democratic government; although my faith is beginning to wane. The source of any federal power—executive, legislative or judicial—must be found, expressly or impliedly, in the federal constitution.<sup>1</sup>

Section One of Article Three of the Constitution declares that *the judicial power of the United States* shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish. The term *judicial*

<sup>1</sup> Craig v. Missouri, 4 Pet. 1. c. 463; McCulloch v. Maryland, 4 Wheat. 316; Hepburn v. Griswold, 8 Wall. 603; U. S. v. Hudson, 7 Cranch. 32; R. I. v. Massachusetts, 12 Pet. 1. c. 719; Downes v. Bidwell, 182 U. S. 1. c. 288.

§ 1 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

*power* means the power to determine specific rights of person or property, asserted by a claimant, against some or all other adverse claimants, in proceedings in a court of justice. This definition, like all other attempts to gather a universe in a nutshell, is subject to some objections; but it is given as being a fairly accurate statement of the general meaning of the phrase.<sup>2</sup>

This definition excludes what are known as merely political questions from the domain of the judiciary. There exists, so far as I am aware, no satisfactory or comprehensive definition of a political, as distinguished from a judicial, question.

Generally speaking, I should say that a political question is one, that according to the required or habitual distribution of sovereignty, is properly determinable by the executive or legislative branches of the government. It is a question so concerning the public as a whole or as an organic political body, that no natural or artificial person, in a private aspect, can be said to have any individual interest or right therein. It is a question really affecting parties that are beyond the reach and binding power of the courts; whose rights do not admit of ultimate decision by a judicial tribunal to which they are bound to submit.<sup>3</sup>

The recognition of a particular government or sovereign; the determination of whether the nation has sovereignty over a particular territory; the existence of war or the status of belligerency; whether the one or the other of the two rival state governments is to be recognized as *de jure*; whether or not a state government is republican in form; the rightfulness of the continued occupation of the territory of a friendly power; the correctness of a decision or course of conduct entrusted to executive discretion: are all ques-

<sup>2</sup> Cf. *Osborn v. Bank*, 9 Wheat. 1. c. 819; *Muskrat v. U. S.*, 219 U. S. 1. c. 356.

<sup>3</sup> *Marshall's Speech*, 5 Wheat. App. 1. c. 17; *Marbury v. Madison*, 1 Cranch. 137; *Foster v. Neilson*, 2 Pet. 1. c. 307; *Cherokee Nation v. Georgia*, 5 Pet. 1. c. 75; Cf. *R. I. v. Massachusetts*, 12 Pet. 1. c. 737.

tions that the courts will generally decline to adjudicate, as being in their nature political, and as not involving directly those rights of person or property which are the subject of judicial determination.<sup>4</sup>

An individual right may possibly be sometimes asserted, of such a character that its justiciation involves the determination of a question which, in its larger aspect, is public or political. Usually in such cases the executive or legislative departments will already, by declaration or conduct, have evinced their position; which will be respected and adopted by the courts. If it should happen that there was no express or implied decision by the political branches, I assume that the Court, for the particular case before it, would be obliged to arrive at its own conclusions, rather than abnegate its judicial function.<sup>5</sup>

Some questions, that might otherwise be regarded as political, are nevertheless under the provisions of the Constitution made justiciable in the courts of the United States.<sup>6</sup> The political incapacity of the states to deal as nations with one another, is the reason for vesting jurisdiction in the federal courts of controversies between them. Thus, where two states of the Union are not agreed upon questions of common boundary, the Supreme Court has jurisdiction as an arbiter fixed by the Constitution;<sup>7</sup> and the jurisdiction is not confined to questions of boundary.<sup>8</sup>

<sup>4</sup> Cf. *Foster v. Neilson*, 2 Pet. 253; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Luther v. Borden*, 7 How. 1; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Kennett v. Chambers*, 14 How. 38; *Chae Chan Ping v. U. S.*, 130 U. S. 581; *Clough v. Curtis*, 134 U. S. 361; *Georgia v. Stanton*, 6 Wall. 50; *In re Cooper*, 143 U. S. 472; *Neely v. Henkel*, 180 U. S. 109; *Pacific States, Etc., Co. v. Oregon*, 223 U. S. 118.

<sup>5</sup> Cf. *Williams v. Insurance Co.*, 13 Pet. 415; *in re Cooper*, 143 U. S. 472.

<sup>6</sup> *Hans v. Louisiana*, 134 U. S. 1; *Rhode Island v. Massachusetts*, 12 Pet., 1. c. 737; *Luther v. Borden*, 7 How., 1. c. 56.

<sup>7</sup> *Rhode Island v. Massachusetts*, 12 Pet. 657; *Virginia v. West Virginia*, 11 Wall. 39; *Virginia v. Tennessee*, 148 U. S. 503.

<sup>8</sup> *Missouri v. Illinois*, 180 U. S. 208; *Kansas v. Colorado*, 206 U. S. 46.

§ 2 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

It will be further observed that the definition of judicial power excludes by its terms merely advisory or moot opinions upon a thesis or proposition of law submitted for the views of the judges in the absence of an actual controversy. Such a power is probably, under the provisions of the Constitution, excluded from the judicial power of the United States.<sup>9</sup>

The general theory of the Constitution is that the great powers of government are divided into three separate departments;<sup>10</sup> and our definition must always be understood, in general, as excluding the performance of mere administrative functions,<sup>11</sup> as well as any assumption of legislative power.<sup>12</sup>

§ 2. **Constitutional Grant—Immunity of State.**—The judicial power of the United States is by Section Two of Article Three of the Constitution declared to *extend*:

(a) To all *cases* in law and equity arising under (1) the Constitution, (2) the laws, (3) the treaties made or to be made under the authority of the United States.

(b) To all *cases* affecting ambassadors, other public ministers and consuls.

(c) To all *cases* of admiralty and maritime jurisdiction.

(d) To *controversies* (1) to which the United States shall be a party, (2) between two or more states, (3) between a state and citizens of another state, (4) between citizens of different states, (5) between citizens of the same state claiming lands under grants of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens or subjects.

<sup>9</sup> *Marye v. Parsons*, 114 U. S. 325; *Singer Mfg. Co. v. Wright*, 141 U. S. 696; *Re Sanborn*, 148 U. S. 222; *Williams v. Hagood*, 98 U. S. 72; *U. S. v. Evans*, 213 U. S. 297; *Muskrat v. U. S.*, 219 U. S. 346; *Cf. Gordon v. U. S.*, 117 U. S. 697, App.

<sup>10</sup> *Kendall v. U. S.*, 12 Pet. 1. c. 610; *Martin v. Hunter's Lessee*, 1 Wheat. 1. c. 329; *Kilbourn v. U. S.*, 103 U. S. 168.

<sup>11</sup> *Hayburn's Case*, 2 Dall. 409; note. *U. S. v. Ferreira*, 13 How. 40; note. *Gordon v. U. S.*, 117 U. S. 697, App.; *Honolulu Co. v. Hawaii* 211 U. S. 282; *Ex parte Gans*, 17 Fed. 471.

<sup>12</sup> *Cf. Wayman v. Southard*, 10 Wheat. 1. c. 42; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Cf. also, Honolulu Co. v. Hawaii, supra.*

The jurisdiction originally conferred over controversies between a state and citizens of another state (see d (3) *supra*), and over controversies between a state or the citizens thereof and foreign states, citizens or subjects (see d (6) *supra*), has been curtailed by the Eleventh Amendment, adopted shortly (1798) after the decision in *Chisholm v. Georgia*.<sup>13</sup> It was therein provided that “the judicial power of the United States shall not be construed to extend to any suit at law or in equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.” The real purpose of this amendment has been rather truculently asserted to be the protection of the states from their creditors.<sup>14</sup> Its effect is to restore to the states the immunity of a sovereign from original suits in the federal courts brought by individuals, who, under the earlier grant of judicial power, could have peremptorily summoned them to the bar of federal justice. It has left open, however, the very serious and embarrassing necessity of deciding when a suit is, or is not, within the meaning of this prohibition, “commenced or prosecuted against one of the United States.”

§ 3. **When Suit Is Against State.**—Under the general principles of law the immunity so conferred is not absolute, but a mere privilege that is waived by authorized submission to the jurisdiction.<sup>15</sup> It was originally laid down by the greatest constitutional lawyer who ever sat upon an American bench, that the prohibition of the Eleventh Amendment was limited to those cases in which a state was a party on the face of the record.<sup>16</sup>

A state, however, is an intangible and incorporeal entity. It acts of necessity through official agents, whose duties are marked out by the laws of the state. If it were held that these

<sup>13</sup> 2 Dall. 419.

<sup>14</sup> *Cohens v. Virginia*, 6 Wheat. 1. c. 406.

<sup>15</sup> *Clark v. Barnard*, 108 U. S. 436; *Gunter v. Atlantic, etc., Co.*, 200 U. S. 273; *Farish v. State Banking Board*, 235 U. S. 498.

<sup>16</sup> *Osborn v. Bank of U. S.*, 9 Wheat. 739; *Bank of U. S. v. Planters' Bank*, 9 Wheat. 1. c. 906.

§ 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

agents were subject in all respects to the control and jurisdiction of the federal courts in all cases where the state was omitted from the record as a party, the vital meaning and effectiveness of the solemn constitutional negation would be frittered away. It would become a mere *brutum fulmen*, easily tricked by the agility of the pleader. Inasmuch as the state is bound to act through agents, to control these agents, when acting as such within the scope of their authority, is to exercise a jurisdiction, that is forbidden, over the state itself; and the canon of the great Chief Justice was thereafter evaded by himself.<sup>17</sup>

Although persisted in after his death,<sup>18</sup> it has long since been utterly abandoned as too technical and formal a test; and it has long been settled that the question is to be determined by a consideration of the essential nature of the case, as presented by the whole record. The Court, in every case, will look through and behind the nominal parties on the face of the record to ascertain who are the real and substantial parties to the suit.<sup>19</sup>

The question in every case must be: Is the obligation or liability in effect asserted or endeavored to be enforced against, or out of the funds or property of, the state itself? If so, the jurisdiction does not exist. If, on the other hand, the liability or obligation is asserted as against the individual, who attempts outside of valid legal authority—though under color of his official station—to withhold *specific* moneys or property that are in law the moneys or property of the plaintiff, or to perpetrate wrongs and trespasses against the personal or property rights of the complainant; that individual cannot shelter himself behind the stolen livery of official functions, or the ineffectual bulwark of unconstitutional laws. The line of demarcation thus indicated is exceedingly difficult in application to concrete cases; and the authorities are numerous and almost impossible of clear reconciliation.

<sup>17</sup> *Governor of Georgia v. Slaves*, 1 Pet. 1. c. 123.

<sup>18</sup> *Louisville, etc., Red Co. v. Letson*, 2 How. 1. c. 551.

<sup>19</sup> *In re Ayers*, 123 U. S. 443; *Fitts v. McGehee*, 172 U. S. 516; *Smith v. Reeves*, 178 U. S. 436; *Ex parte Young*, 209 U. S. 123.

A bill in equity against state officers to compel the performance of acts which would amount to the specific performance of a contract by the state;<sup>20</sup> a suit against a state officer, as such, to compel him to take out of the general funds in the state treasury taxes alleged to have been illegally collected, and return the amounts so exacted from them to the plaintiffs;<sup>21</sup> a bill to compel the payment, as a trust-fund, by a state officer of the proceeds of a tax, which were commingled with and indistinguishable from the general funds of the state;<sup>22</sup> and a bill to quiet title to lands, and set aside alleged unconstitutional tax-sales at which the state has become the purchaser;<sup>23</sup> are instances of the first branch of the rule denying jurisdiction.

On the other hand, an action in detinue to recover specific personal property distrained by a tax-collector for non-payment of taxes, where the taxes due were tendered in coupons which, upon their issue, had been made receivable for such taxes, is not converted into an action against the state by reason of the fact that a later and invalid state law has attempted to unconstitutionally repeal the contract made to receive such coupons;<sup>24</sup> a suit against the members of a state railroad commission to prevent them from enforcing an order compelling interstate trains to stop at designated station, where under the circumstances of the order it is an unjustifiable interference with interstate commerce, is not a suit against the state;<sup>25</sup> and it is even held that the federal court may, consistently with this amendment, enjoin the attorney-general of a state from proceeding, in the general performance of his official duties, to begin proceedings and prosecutions for the enforcement of a law that is invalid as against the provisions of the federal constitution.<sup>26</sup>

<sup>20</sup> *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

<sup>21</sup> *Smith v. Reeves*, 178 U. S. 436.

<sup>22</sup> *Louisiana v. Jumel*, 107 U. S. 711.

<sup>23</sup> *Chandler v. Dix*, 194 U. S. 590.

<sup>24</sup> *Poindexter v. Greenhow*, 114 U. S. 270.

<sup>25</sup> *Mississippi, etc., Commission v. I. C. R. Co.*, 203 U. S. 335.

<sup>26</sup> *Ex parte Young*, 209 U. S. 123. Cf. also *U. S. v. Lee*, 106 U. S.



§ 4 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

It is still the law, I think, that when the state becomes a corporator or shareholder in a trading corporation, the latter is not endowed with the sovereign immunity from suit.<sup>27</sup>

§ 4. “**Extend**”—“**Cases**”—“**Controversies.**”—The term *extend*, as used in Section Two of Article Three of the Constitution, has (contrary to general supposition) been recently declared by the Supreme Court<sup>28</sup> to mean *include*; and not to involve or require that the *judicial power of the United States*, mentioned in Section One, be confined to the matters specified in Section Two. This probably ought to be understood as asserting that the judicial power of the nation must extend (except so far as necessarily or expressly limited by other portions of the Constitution) to all such matters as are properly *national*. The determination of what is national must be derived from the Constitution. To assert that, in the absence of express limitation elsewhere, the grant of *the judicial power of the United States* to the Supreme and inferior courts would vest in (or enable Congress to assign to) those courts unlimited and unrestrained jurisdiction over all possible property and personal relations within the territory of the United States, regardless of the *national* character of the controversy, would be to abolish the sovereignty of the individual states, insofar as that sovereignty might be manifested in acts of judicature. The rule intended to be enunciated must be, that the enumeration set forth in the second section of Article 3 is not exhaustive; but that the grant of judicial power in the first section is limited by the words “of the United States”—not in the sense of mere territorial limitation, but as implying a judicial power potentially co-extensive

196; *Smyth v. Ames*, 169 U. S. 466; *Scott v. Donald*, 165 U. S. 107; *Reagan v. Trust Co.*, 154 U. S. 362; *Flitts v. McGehee*, 172 U. S. 516; *Murray v. Wilson Distilling Co.*, 213 U. S. 151; *Western Union Co. v. Andrews*, 216 U. S. 165; *Hopkins v. Clemson College*, 221 U. S. 636; *Cunningham v. Macon, etc., Co.*, 109 U. S. 446.

<sup>27</sup> *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904; *Bank of Ky. v. Wister*, 2 Pet. 1. c. 323.

<sup>28</sup> *Kansas v. Colorado*, 206 U. S. 46; *Contra*: Cf. *Robertson v. Baldwin*, 165 U. S. 1. c. 279; *Dred Scott v. Sandford*, 19 How. 1. c. 401.

with the nature and necessities of the national government erected by the Constitution; adequate for the efficiency and protection of the executive and legislative departments and for the maintenance of rights under the Constitution; but extending no further, save in pursuance of the plain mandate of that instrument.<sup>29</sup>

From such a standpoint, the second section of the article really extends, to some degree, the judicial power of the United States beyond the norm thus indicated, in that it provides for some matters of jurisdiction not plainly national—*e. g.*, a suit between citizens of different states.

The use of “*Cases*” and “*Controversies*” seems to me to have been an accidental and euphonious variation. It was early suggested that *Controversies* embraced only civil proceedings, and this has been subsequently recognized.<sup>30</sup> The term “*Case*” connotes the assertion of his rights, before a court, by a party in such a form as that, under existing laws, they fall within the competence of the judicial power.<sup>31</sup>

**§ 5. Necessity for National Judiciary—Jurisdiction Over Whole Case.**—The theory of every sovereignty involves a judiciary as one of the *numina* or manifestations of that sovereignty. Under our partition of the powers of government, it was plainly impossible to vest the state courts with the sole power to decide questions arising under the constitution, laws and treaties of the United States. There would have resulted in effect as many different constitutions, laws and treaties as there were different state interests and attachments.<sup>32</sup> Furthermore, as legal rights involve the determination of the facts to which the law is to be applied, it would not have been safe

<sup>29</sup> Cf. *Osborn v. Bank*, 9 Wheat. 818; *Kendall v. U. S.*, 12 Pet. 1. c. 619; *Cohens v. Virginia*, 6 Wheat. 1. c. 384.

<sup>30</sup> *Chisholm v. Georgia*, 2 Dall. 1. c. 431; *Muskrat v. U. S.*, 219 U. S. 1. c. 356.

<sup>31</sup> Cf. *Osborn v. U. S. Bank*, 9 Wheat. 1. c. 819; *Cohens v. Virginia*, 6 Wheat. 1. c. 379, 1. c. 405; *Interstate Commerce Com. v. Brimson*, 154 U. S. 1. c. 475.

<sup>32</sup> Cf. *Martin v. Hunter's Lessee*, 1 Wheat. 1. c. 347-8; *Cohens v. Virginia*, 6 Wheat. 1. c. 416.

in all cases to permit the state authorities to settle the facts. It was certainly not practicable to split up the trial of an integral case between the state and federal courts so as to require two trials in which the facts might be differently found.

The possible bias of a state court against a litigant, who was a citizen of another state or country, furnished the reason for vesting in national courts, as more impartial tribunals, the jurisdiction based upon diversity of citizenship, though no federal questions were involved. Necessarily, where this is the sole ground of jurisdiction, the federal court finds the facts and applies to them the law only of the appropriate state, as it is, or ought to be, administered between citizens of that state.<sup>33</sup>

The jurisdiction with respect to admiralty and maritime matters and over cases affecting foreign representatives, was deemed to be intimately associated with foreign intercourse and national peace.<sup>34</sup>

Upon grounds above suggested, it is settled, under existing statutes, that wherever a federal court obtains lawful jurisdiction, upon any ground, of a cause prior to trial, it has jurisdiction to decide the whole case, including the finding of the facts and the application thereto of both state and federal laws.<sup>35</sup>

**§ 6. In What Cases Federal Jurisdiction Exclusive.—**The instances of jurisdiction set forth in the second section of Article 3 do not expressly require the exclusion of the state court from any share in the decision of all such controversies. Some matters, however, from their legal nature and in the light of general principles, would unavoidably fall within the exclusive jurisdiction of the federal courts. Pure sovereignty in its nature is non-delegable save to its own instrumentali-

<sup>33</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 1. c. 347; *Polk's Lessee v. Wendell*, 5 Wheat. 1. c. 302; *Gordon v. Longest*, 16 Pet. 1. c. 104.

<sup>34</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 1. c. 347.

<sup>35</sup> *L. & N. R. R. Co. v. Siler*, 213 U. S. 175; *Osborn v. U. S. Bank*, 9 Wheat. 1. c. 823; *Nashville v. Cooper*, 6 Wall. 247.

ties. No sovereign undertakes to vindicate the violated criminal laws of another.

No sovereignty can be drawn into the courts of another and subjected to the compulsory process, mesne or final, of its courts. No sovereignty is suable in its own courts without its consent, and that consent is revocable and confers no right. Without provision for such a jurisdiction in the federal courts, one state, with respect to such questions, for example, as disputed boundaries, would have been unable to sue another, or to enforce any appearance, or render through its courts any judgment against another state.

In the main, however, in the absence of contrary legislation by Congress, the judicial power of the states, exercised through their courts, is competent to act upon all persons and property within the jurisdictional limits of the state, and to apply to them the laws of the United States (which are indeed the supreme laws in every state) as well as the laws of the state. It would probably be competent for Congress to declare that the jurisdiction vested by the constitution in the federal courts should be administered by them alone.<sup>36</sup>

But so radical a step has never been undertaken. It is the general rule, therefore, in the absence of prohibitory legislation by Congress, that state courts may, within their jurisdiction, administer and enforce civil rights, arising under or depending from the constitution, laws and treaties of the United States, or between persons of diverse citizenship, or otherwise falling within the federal jurisdiction.

It is provided, however, by federal statute,<sup>37</sup> that the jurisdiction of the courts of the United States shall be exclusive of the courts of the several states in the following matters:

(a) Of all crimes and offenses cognizable under the authority of the United States.

(b) Of all suits for penalties and forfeitures under the laws thereof.

<sup>36</sup> *The Moses Taylor v. Hammons*, 4 Wall. 411.

<sup>37</sup> Sec. 256, J. C.

§ 7 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

(c) Of all civil causes of admiralty and maritime jurisdiction; *saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it.*

(d) Of all seizures under the laws of the United States on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

(e) Of all cases arising under the patent-right or copyright laws of the United States.

(f) Of all matters and proceedings in bankruptcy.

(g) Of all civil controversies where a state is a party; except (1) between a state and its citizens, and (2) between a state and citizens of other states or aliens.

(h) Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

With respect, therefore, to the foregoing matters, the jurisdiction in all stages is plainly and exclusively federal.

§ 7. **Two Great Classes of Federal Jurisdiction.**—The jurisdiction of the federal courts is usually said to be divisible into two great classes, viz.: (1) Those matters in which their jurisdiction depends upon the character of the cause, whoever may be the parties; and (2) those in which the jurisdiction depends upon the character of the parties, whatever may be the nature of the cause.<sup>38</sup>

This classification is of great value and importance for practical purposes and should be kept in mind. To the first class belong (a) causes arising under the constitution, laws or treaties of the United States, and (b) cases of admiralty and maritime jurisdiction.

Under the second class will come all the other instances specified in the constitution, except controversies between citizens of the same state, claiming lands under grants of different states.

<sup>38</sup> *Cohens v. Virginia*, 6 Wheat. 1. c. 378.

While usually assigned to the second class, this species would seem to be really hybrid, since one of the indispensable requisites is citizenship of the same state, referring to the character of the parties, and the other is the involution in the controversy of grants from different states. qualifying the character of the cause. It is noteworthy that but two subdivisions of the exclusive federal jurisdiction, viz., (g) and (h), fall into Marshall's second category, and that these deal respectively with controversies between domestic states or against the representatives of foreign states.

Certain subdivisions of the exclusive federal jurisdiction are not clear upon their face, and demand explication.

**§ 8. Admiralty Jurisdiction—Saving of Common-Law Remedy.**—In the first place, let us consider what is meant by civil causes of admiralty and maritime jurisdiction and the saving of a common-law remedy. We may say that from olden times the law of the sea was recognized as a thing apart from the law of the land. Of the legendary beginning and early development of the maritime law we may not here speak, except to note that it had a continental origin long prior to its English adoption and development. The rule was early developed in the common-law courts that the venue must be laid, according to the fact, within the body of the particular county where all or part of the transaction occurred. The trial by jury or assize involved originally the notion that disputed facts were to be settled by those taken from the vicinage. The procedure naturally qualified and circumscribed early notions of jurisdiction. The common-law courts did not originally exercise jurisdiction over contracts entered into or torts committed outside the body of any county, and I think the better opinion is the same with respect to crimes.<sup>39</sup>

There would thus be left a considerable portion of what might be called foreign jurisdiction, vested not in the common-law courts, but exercised originally by maritime and mer-

<sup>39</sup> Cf. Street: *Legal Liability*, vol. 3, p. 90; *Select Essays on Anglo-Am. Leg. Hist.*, vol. 1, p. 297; *Reg. v. Keyn*, 2 Ex. Div. 163.

cantile tribunals. In so far as this residuum dealt with matters occurring upon the seas and outside the realm of England, it was delegated (along with other matters not here material) by the King and his council to the Court of the Admiral; which first makes its appearance in that country, under such a name, about the beginning of the fourteenth century. That court adopted and employed a procedure borrowed, along with some substantive doctrine, from the civil law. It was entirely natural that a jurisdiction relating to the sea should be widened to include matters or transactions maritime in their nature, though not allocable, strictly speaking, upon the high seas.

In later times, with the advent of fictitious venue, and the recognition of the transitory character of personal actions, the jurisdiction of the common-law courts, in matters *in personam*, became concurrent in many respects with that of the admiralty.

We say *in personam*, because in common-law actions dealing with personalty there was (so far as I am aware) no such conception as an action *in rem*, where the *res* itself was the essential defendant and the judgment bound the world. The common-law action was essentially against the person, the judgment was personal in substance, and could affect property only through, and to the extent of, the interest of that person. These limitations are inherent in the notion of a *common-law remedy*.

Courts of Admiralty, on the other hand, had borrowed from the civil law and developed a true jurisdiction *in rem*, through the maritime lien; and they also exercised a jurisdiction *in personam*, quite like that of the common law, but administered under the modes and forms of proceedings characteristic of admiralty courts.

It was intended by our statute to stress the character of the *remedy* which the state courts might afford, rather the name of the court in which it should be administered. The effect of the matter is, that insofar as a cause of action (arising from the general rules of law or statutory enactment) falls

within the admiralty and maritime jurisdiction, and is likewise susceptible of a common-law *remedy*, a suit thereon that is essentially *in personam* may be maintained either in a court of admiralty or in any competent court of common law or equity, whether state or federal. Such a suit may likewise be maintained thereon in the state courts, though it be coupled with an auxiliary attachment against the ship or other maritime property, so long as the attachment is levelled as against the property of the individual defendant and strikes at his interest alone. If, on the other hand, the action be essentially *in rem*, against the thing itself, and not against the interest therein of some individual who constitutes the real defendant, the cognizance of the cause (if it fall within the class of subjects embraced within the admiralty jurisdiction) is exclusively federal; and this is true, though a personal monition be directed against the owner.<sup>40</sup>

The jurisdiction of matters of prize is made exclusive in the courts of the United States by the statute cited above. The respective authorities of state and nation over crimes will be considered hereafter, in a more appropriate connection.

**§ 9. Cases Arising Under Patent, Etc., Laws—Federal and State Jurisdiction.**—A case consists of the right asserted by one party as well as the other; but the plaintiff first invokes the exercise of jurisdiction by the court, and where (as in the case of the federal courts) that jurisdiction is not general or universal, but limited to certain cases or controversies, the *prima facie* presumption is against jurisdiction where it does not appear.

Because the assumption of jurisdiction must be prior to summons and the filing of defensive pleadings, the *opening* pleading must show that the case is one arising *under* the patent-right or copyright laws of the United States. If it does not so show, the federal jurisdiction does not attach, but

<sup>40</sup> Knapp, Etc., Co. v. McCaffrey, 177 U. S. 638; Rounds v. Cloverport, Etc., Co., 237 U. S. 303; Leon v. Galceran, 11 Wall. 185; The Belfast, 7 Wall. 624; The Moses Taylor v. Hammons, 4 Wall. 411.



the case is one for adjudication by the state courts, unless there be diversity of citizenship or some other ground of federal justiciability. Conversely, where the opening pleading in the state court discloses that the case arises under the patent-right or copyright laws, the state court is without jurisdiction.

To constitute a case arising under the patent-right or copyright laws of the United States, *the plaintiff* must set up some right, title or interest under the patent laws or at least make it appear that some right or privilege will be defeated by one construction or sustained by the opposite construction of those laws.<sup>41</sup>

There is a clear distinction between a *case* arising under the patent-right or copyright laws, and a *question* involving them. A case arises when the opening pleading sets up a right under such laws *as a ground of recovery*. A *question* may appear in the plea, answer or testimony.<sup>42</sup>

Once attached, the jurisdiction, whether of state or federal court, is not ordinarily ousted by the subsequent course of the pleadings or the facts developed; but this statement must be read, so far as the federal courts are concerned, in connection with the statute making it their duty to dismiss a cause if any time it appears not to really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court.<sup>43</sup>

We shall hereafter discuss with more fullness the question when a case arises under the constitution or laws of the United States and that treatment, like all other comparative study in law will be illuminative here.

The determination of the validity and scope of a patent, including the claims and specifications involved in its issue, and suits for infringement of the artificial monopoly created

<sup>41</sup> Pratt v. Paris, Etc., Co., 168 U. S. 255; Excelsior, Etc., v. Bridge Co., 185 U. S. 282; Henry v. Dick Co., 224 U. S. 1. c. 16.

<sup>42</sup> Pratt v. Paris, Etc., Co., 168 U. S. 255; Excelsior, Etc., Co. v. Bridge Co., 185 U. S. 282.

<sup>43</sup> Section 37, J. C.; Excelsior, Etc., Co. v. Bridge Co., 185 U. S. 1. c. 287.

by a patent-right, whether brought by the original patentee or his assignees or licensees, would seem to arise *under* such law. On the other hand, a suit upon a contract, the subject-matter of which was in whole or in part a patent-right, but wherein there is asserted no right based upon the validity, construction or infringement of the letters-patent, is not a case arising under the patent-right laws of the United States.<sup>44</sup>

Thus a suit to compel the specific performance of a contract for the sale of an interest in a patent does not arise under the laws of the United States;<sup>45</sup> and where an action is brought to enjoin an assessment by the state of patent-rights for taxation, the federal court has no jurisdiction upon the ground that the case arises under the patent-right laws.<sup>46</sup> Similar principles would apply to copyright cases.

§ 10. **Bankruptcy—Jurisdiction of State and Federal Courts.**—The statute confers upon the federal courts exclusive jurisdiction over all matters and proceedings in bankruptcy. This provision must be interpreted in connection with the statutes of bankruptcy. With that subject in general we do not propose to deal, further than to delimit the jurisdiction as between the state and federal courts.

For this purpose, we might distinguish:

A. The essential *proceeding in bankruptcy*, involving the filing of the petition—the adjudication of bankruptcy—the taking possession of the property claimed to constitute the estate or a part thereof, where no *adverse claim* is asserted by its possessor, or is found to exist—the administration of the property in the actual possession of the bankruptcy court, or its officers or agents as such, and the determination of conflicting claims to such property—the adjustment of the claims of creditors—the distribution of the estate as finally defined—the judgment of discharge—and proceedings of a strictly accessory or ancillary character forming branches of

<sup>44</sup> *Wade v. Lawder*, 165 U. S. 624; *Littlefield v. Perry*, 21 Wall. 205.

<sup>45</sup> *Marsh v. Nichols*, 140 U. S. 344.

<sup>46</sup> *Hall v. Indiana Mfg. Co.*, 176 U. S. 68.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

the legal organism designated as *the proceeding in bankruptcy*, from

B. Proceedings of a *plenary* or *quasi-independent* character involving the determination, as between the trustee and actual *adverse claimants*, whether particular property, real or personal that is *not* within the actual or constructive possession of the bankruptcy court, or its officers or agents as such, or that is within the possession or control of such *adverse claimants*, shall be brought within the *res* or estate to be administered, or whether the particular claim or debt is due or payable, by the *adverse claimant* withholding it, to the representative of the court.

I believe it may be stated that matters and proceedings falling within (A) are exclusively within the jurisdiction of the bankruptcy courts, and are therefore exclusively federal in cognizance. Matters and proceedings falling within (B) are, either of (1) concurrent jurisdiction in the state and federal courts or (2) exclusive jurisdiction in the state courts.

Included within the concurrent jurisdiction are cases where some ground of general federal character is present, like diversity of citizenship; where the trustee brings suit to recover voidable preferences under Section 60-b of the Bankruptcy Law; where the trustee sues to avoid transfers made with intent to hinder or defraud creditors, or held invalid by law against creditors, under Section 67-e of said law; where the trustee sues to recover property transferred, when the transfer might have been avoided by any creditor of the bankrupt, unless the property be in hands of bona fide purchasers, under Section 70-e of the same law; and where, in suits by the trustee, the consent of the defendant, if given, vests jurisdiction in the federal court; if withheld, leaves the jurisdiction in the state courts, under Section 23-b, of the Bankruptcy Law. I believe that all other civil jurisdiction included within (B) is exclusively state.

§ 11. **Supreme Court—Original and Appellate Jurisdiction.**—It is provided by the second clause of Section 2 of Article 3 of the Constitution, that “in all cases (1) affecting

ambassadors, other public ministers and consuls, and (2) . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.” This is the only assignment or allotment of jurisdiction, to any court, in the constitution. The grant of original jurisdiction is not exclusive in the cases mentioned, but all or any portion thereof may in the discretion of Congress be concurrently vested in other federal courts; though no legislation can destroy, limit or extend the original jurisdiction of the Supreme Court as expressed in the constitution.<sup>47</sup>

The court must probably be left with *some* appellate jurisdiction; but the scope and extent of that jurisdiction is for the regulation of Congress.<sup>48</sup>

The appellate jurisdiction as to matters of *fact* vested in the Supreme Court by the constitution evoked such a storm of protest from advocates of the sacred right of trial by jury, that the Eighth Amendment was immediately adopted, preserving the right of trial by jury in suits at common law, where more than twenty dollars was involved, and limiting the power of any federal court to review a verdict save as permitted by the common law.

§ 12. **Organization of Courts—Limited but not Inferior—Courts Enumerated.**—Even after the adoption of the constitution, the judiciary could not organize itself. It was the duty and obligation of Congress to immediately enact laws providing for the distribution and appropriate exercise of the judicial power of the United States.<sup>49</sup>

In obedience to this obligation, Congress has erected the

<sup>47</sup> *Marbury v. Madison*, 1 Cranch. 137; *U. S. v. Hudson*, 7 Cranch. 32; *Cohens v. Virginia*, 6 Wheat. 264; *Börs v. Preston*, 111 U. S. 449.

<sup>48</sup> Cf. *Durosseau v. U. S.*, 6 Cranch. l. c. 313.

<sup>49</sup> *Rhode Island v. Massachusetts*, 12 Pet. l. c. 721.

## § 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Supreme Court and regulated its activities; and has established certain courts, inferior to the Supreme Court, and distributed among them such jurisdiction as it has deemed proper to confer. It is certain that Congress has fallen far short of conferring upon the inferior federal courts, singly or collectively, the full of potential federal jurisdiction; just as it has never found it necessary to stretch to their full arc all its legislative powers.<sup>50</sup>

Being courts created by statute, they must look to a valid statutory grant for the measure and justification of their jurisdiction.<sup>51</sup>

While not technically inferior courts, they are courts of *limited* jurisdiction,<sup>52</sup> and for the reason that their jurisdiction exists only by virtue of a statute, their jurisdiction ought to appear in some form upon the record to warrant and authorize the court in undertaking to justiciate the cause.

It is settled, however, that even where the jurisdiction is not shown upon the face of the record, their judgment cannot therefore be collaterally attacked or disregarded. Such a judgment would be *erroneous*, and subject to reversal upon appeal or writ of error; but it would not be a nullity.<sup>53</sup>

The federal courts inferior to the Supreme Court are as follows:

- (a) The District Courts.
- (b) The Circuit Courts of Appeals.
- (c) The Court of Claims.
- (d) The Court of Customs Appeals.

<sup>50</sup> Cf. *Turner v. Bank*, 4 Dall. 10.

<sup>51</sup> *Cary v. Curtis*, 3 How. 1. c. 245; *Sheldon v. Sill*, 8 How. 1. c. 448; *Nashville v. Cooper*, 6 Wall. 247; *Case of the Sewing Machine Cos.*, 18 Wall. 553; *Kentucky v. Powers*, 201 U. S. 1. c. 24.

<sup>52</sup> *Turner v. Bank*, 4 Dall. 1. c. 11; *Kempe v. Kennedy*, 5 Cranch. 1. c. 185.

<sup>53</sup> *Evers v. Watson*, 156 U. S. 527; *Dowell v. Applegate*, 152 U. S. 327; *Cutler v. Huston*, 158 U. S. 423; *McCormick v. Sullivant*, 10 Wheat. 192; *Riverdale Mills v. Alabama, Etc., Co.*, 198 U. S. 188.

I omit from this list the courts maintained in the various dependencies. They do not constitute, in a technical sense, "courts of the United States."<sup>54</sup>

The statutes relating to the composition, jurisdiction and (in some measure) the procedure of the courts listed above (as well as of the Supreme Court) are set forth in a comprehensive enactment, known as the "Judicial Code," adopted by Congress in 1911. It is in a process of constant amendment. This "Code" is not a creation, but in substantial effect a mere compilation. Its most striking feature was the abolishment of the Circuit Courts, which had existed from the beginning of the government, and the transfer of their functions to the District Courts, to which we now turn our attention.

<sup>54</sup> *Insurance Co. v. Cotton*, 1 Pet. 1. c. 546; *Benner v. Porter*, 9 How. 235; *Hornbuckle v. Toombs*, 18 Wall. 648; *Reynolds v. U. S.*, 98 U. S. 145; *Good v. Martin*, 95 U. S. 90; *U. S. v. McMillan*, 165 U. S. 504; *McAllister v. U. S.*, 141 U. S. 174; *Clinton v. Engelbrecht*, 13 Wall. 434.

## **CHAPTER II.**

### **DISTRICT COURTS—TERRITORIAL ASPECTS**

- § 1. Creation of District Courts—Divisions.
2. Power of Courts Limited to Territorial Sovereignty.
3. Jurisdiction of a District Court not Coincident with National Boundaries.
4. Venue of Suits in District Courts.
5. Waiver of Venue—"Plaintiff" and "Defendant" Used Collectively.
6. Dispensability of Party—Statute.
7. Dispensability of Party—Rule of Court.
8. Actions of a Local Nature.
9. Lien Upon or Claim to Property in District—Publication.
10. Property in Two Districts—Transfer Between Divisions.
11. District Ordinarily Limit to Exercise of Jurisdiction—Exceptions.
12. Personal Presence in District—Process on Corporations.
13. Corporation Must be Doing Business in State.
14. Service Upon Foreign Corporations.
15. Doing Business—What Amounts to.
16. Service on Agents—State Statutes.
17. Doing Business and Service on Agent in District Necessary.

§ 1. **Creation of District Courts—Divisions.**—The District Courts are the courts of first instance in ordinary litigation falling within the federal jurisdiction. The United States is, or until very recently was, laid out into eighty-one districts, for each of which is established a District Court. Each district lies wholly within a single state, never crossing a state boundary. Frequently a district is co-terminous with the state, in which event it is known by the name of the state; *e. g.*, the District of Indiana, the District of Maryland, the District of New Hampshire, etc. Other states comprise two districts, in which case the respective districts are given a title indicative of their geographical location within the state; *e. g.*, the Eastern and Western Districts of North Carolina, the Northern and Southern Districts of Mississippi, etc.

Still other states contain three districts similarly designated; *e. g.*, the Northern, Middle and Southern Districts of Alabama; the Northern, Southern and Eastern Districts of Illinois; the Eastern, Middle and Western Districts of Pennsylvania, etc. Two great states, at opposite ends of the country, viz., New York and Texas, contain each four districts, designated respectively as the Eastern, Western, Northern and Southern Districts of each state. Not infrequently a district is divided by statute, for the convenience of litigants, into two or more divisions. Thus the Eastern District of Missouri is composed of the *Eastern Division*, which comprises the City of St. Louis, and seventeen outlying counties; the *Northern Division*, containing fifteen counties; and the *South-eastern Division*, containing sixteen counties.

Proceedings brought or pending in any *division* of a district are so entitled, as, "In the Eastern Division of the Eastern District of Missouri." As will be seen hereafter, the different divisional courts are regarded, for some purposes, as distinct jurisdictions.

**§ 2. Power of Courts Limited to Territorial Sovereignty.**—Courts can exercise no judicial power over persons or property not within the jurisdictional limits of the sovereignty creating them.<sup>1</sup> The service of process from a federal court upon a person in London, in a personal action, is a nullity. The same is true of such process issued by the courts of one state and served in another.<sup>2</sup> In either case the defendant might confer jurisdiction over his person by entry of appearance, in person or by authorized representative.<sup>3</sup>

If a federal court sitting in New York should entertain an action to establish the title of or fix a lien upon, real

<sup>1</sup> Galpin v. Page, 18 Wall. 350; Picquet v. Swan, 5 Mason 40; Ableman v. Booth, 21 How. 506.

<sup>2</sup> D'Arcy v. Ketchum, 11 How. 165; Tloga R. R. Co. v. Blossburg, 20 Wall. 137; Pennoyer v. Neff, 95 U. S. 714; Davis v. Wakelee, 156 U. S. 680.

<sup>3</sup> Hills v. Mendenhall, 21 Wall. 453; Habig v. Folger, 20 Wall. 1; Creighton v. Kerr, 20 Wall. 8; Wilson v. Seligman, 144 U. S. 41.



property situated in Germany the judgment would be equally void; because the sovereign power of the United States cannot invade the soil of sovereign Germany, so as to lay hands upon the land in controversy, or directly determine the title or possession thereof.<sup>4</sup>

The courts of a state cannot, upon the same principle, validly partition lands situated in another state; nor could a Missouri Sheriff be authorized by judgment of his court to levy an execution upon lands or chattels in the State of Kansas.

The courts of a state or nation, however, may be validly authorized to exercise their judicial power over all persons and property within their jurisdictions; and where a proceeding is *in rem* or *quasi in rem*, against property within the jurisdiction it is no objection that some or all of the persons interested therein may be elsewhere and refuse to appear; and this is true, because of the naturally exclusive control that each state or nation has over all property within its boundaries.<sup>5</sup>

There is an apparent but not a real exception to these rules in chancery proceedings. The ordinary operation of a decree in chancery is upon the conscience of the party and *in personam*. Where, therefore, the court has jurisdiction over the person of the parties, it has power to require the defendant (for example) to do or refrain from doing anything beyond the limits of its territorial jurisdiction, which it might require to be done or omitted within the limits of such territory. So where a trust deed, with power of sale, has been made to a trustee, covering a railroad line running through several states, the court in one state, where it has jurisdiction over the persons of the trustee and of the mortgagors, has power to direct a sale of the whole property covered by the mortgage, and to enjoin the mortgagors, and those claim-

<sup>4</sup> Cf. *Dull v. Blackman*, 169 U. S. 243; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105; *Carpenter v. Strange*, 141 U. S. 87; *Freeman v. Alderson*, 119 U. S. 185.

<sup>5</sup> *Arndt v. Griggs*, 134 U. S. 316; *Hamilton v. Brown*, 161 U. S. 256.

ing under them, from interfering with the property in the hands of the purchasers.<sup>6</sup>

Similarly, a court of chancery having jurisdiction over the person of a defendant may decree that he convey the title to property situated in a foreign jurisdiction, and the conveyance will pass the title of such defendant.<sup>7</sup>

**§ 3. Jurisdiction of a District Court not Coincident with National Boundaries.**—Since, then, the judicial power of the

United States is co-extensive with its territorial jurisdiction, it would be competent, in the absence of constitutional prohibition, for Congress to provide that a person charged with having committed a particular federal offense in Texas should be brought to the District of Columbia for trial before a jury composed of qualified inhabitants of that district; or that a plaintiff resident in Maine might begin proceedings in the United States District Court for that district, and summon a resident of California to cross the continent with his witnesses, or suffer judgment by default.

The right of trial by jury in the state and district wherein the offense shall have been committed is secured to the defendant in federal prosecutions for crime by the sixth amendment; and the federal statutes have secured analogous rights in civil causes by imposing local jurisdictional limits upon the District Courts.

**§ 4. Venue of Suits in District Courts.**—As a general rule, no civil suit can be originally brought in any District Court against a defendant, except in the district of his residence; and when a district contains more than one division, suit must be brought in the division wherein he resides.<sup>8</sup> This rule, however, is subject to a number of exceptions:

(1) Where the jurisdiction is founded *solely* on the fact that the action is between citizens of different states, suit

<sup>6</sup>Muller v. Dows, 94 U. S. 444.

<sup>7</sup>Massie v. Watts, 6 Cranch. 148; Watkins v. Holman, 16 Pet. 25; Carpenter v. Strange, 141 U. S. 87; Cf. Falls v. Eastin, 215 U. S. 1.

<sup>8</sup>Cf. J. C., Secs. 51-53.

may be brought either in the district where the defendant resides or where the plaintiff resides and the defendant is found.<sup>9</sup>

(2) Where there are two or more defendants residing in different districts in the same state, suit may be brought within the district of the residence of either; and where two or more defendants reside in different divisions of the same district, suit may be brought in either division.<sup>10</sup>

(3) Neither the general rule, nor the exception in cases of diversity of citizenship, applies to alien defendants, whether natural or corporate; because they are not inhabitants of any district within the United States. They may be sued wherever service can be obtained.<sup>11</sup>

(4) A proceeding in admiralty, whether *in rem* or *in personam*, is not a civil suit within the meaning of the general rule; and the suit may be maintained wherever service on person or property can be had.<sup>12</sup>

(5) Suits for the infringement of letters patent may be brought either (a) in the district of which the defendant is an inhabitant, or (b) in any district in which the defendant shall have committed acts of infringement and has a regular and established place of business.<sup>13</sup>

(6) Civil suits or proceedings arising under the copyright laws may be instituted either (a) in the district of which the defendant or his agent is an inhabitant or (b) in which he may be found.<sup>14</sup>

(7) Suits to recover damages for injury by a monopoly or combination in restraint of trade may be brought in any district where the defendant resides, or is found or has an agent.<sup>15</sup>

<sup>9</sup> J. C., Sec. 51.

<sup>10</sup> J. C., Secs. 52-53.

<sup>11</sup> *In re Hohorst*, 150 U. S. 653; *Re Keasbey & Mattison Co.*, 160 U. S. 1. c. 229; *Barrow Steamship Co. v. Kane*, 170 U. S. 100.

<sup>12</sup> *Atkins v. Fiber Co.*, 18 Wall. 272; *ex parte Louisville Underwriters*, 134 U. S. 488; *Workman v. Mayor*, 179 U. S. 1. c. 573.

<sup>13</sup> J. C., Sec. 48.

<sup>14</sup> 35 Stat. 1084; Act of March 4, 1909.

<sup>15</sup> 35 Stat. 731; Act of October 15, 1914.

(8) Suits to enforce, suspend or set aside an order of the Interstate Commerce Commission may be brought:

(a) In the district of the residence of the party or one of the parties upon whose petition the order was made; but,

(b) Where the order was not made on the petition of any party, or it does not relate to transportation, then the venue is in the district where the matter complained of arises; and in such last-mentioned cases, the matter complained of shall be deemed to arise in the district where one of the complainants in court has his principal operating office.<sup>16</sup>

(9) Proceedings by national banking associations to enjoin the Comptroller of the Currency, under the provisions of the national banking laws, must be brought in the district where the association is located.<sup>17</sup>

(10) Actions to recover pecuniary penalties and forfeitures may be brought either in the district where they accrued or the delinquent is found; and accrued internal revenue taxes may be recovered by suit either in the district where the liability was incurred, or of the residence of the defendant.<sup>18</sup>

(11) A suit brought to recover damages under the Employers' Liability Act may be brought in the district of the residence of the defendant; or in which the cause of action arose, or in which the defendant is doing business.<sup>19</sup>

(12) Suits by persons furnishing labor and material to contractors for public work, upon the bond of such contractor, *must* be brought in the district in which the contract was to be performed.<sup>20</sup>

(13) The general limitation has no reference to *strictly*

<sup>16</sup> 38 Stat. 219; Act of Oct. 22, 1913.

<sup>17</sup> J. C., Sec. 49.

<sup>18</sup> J. C., Secs. 43-44.

<sup>19</sup> Act of April 5, 1910; 36 Stat. 291.

<sup>20</sup> Act of Feb. 24, 1905; 33 Stat. 811; Cf. U. S. v. Congress Construction Co., 222 U. S. 199.

ancillary or supplementary proceedings. What are generally to be so regarded, we shall hereafter have occasion to notice.

Other exceptions to the general rule exist; but we have here set down those which seemed most important.

§ 5. **Waiver of Venue—"Plaintiff" and "Defendant" Used Collectively.**—The foregoing general rule, and most of the exceptions to its operation, are not essentially limitations upon the jurisdiction of the federal courts with respect to *subject-matter*, but are rather rules of venue for the benefit and protection of the parties, who may renounce the favor. Of course, a statute relating to venue may be so phrased or deal with such subject-matter as to negative, expressly or by necessary implication, the privilege of waiver; but such an implication ought to be manifest and unmistakable. Where the basis of jurisdiction is diversity of citizenship, the defendants, for example, under present laws, may waive their privilege of being sued only within the district of their residence or the residence of the plaintiff; and do waive it by appearing generally to contest the suit without objection.<sup>21</sup>

The same rule prevails where the suit arises under the constitution, laws or treaties of the United States.<sup>22</sup>

Absent waiver, it is plain that the limitation as to place of suit must at times curtail jurisdiction over particular subject-matters, because some cases arise where necessary co-plaintiffs are not inhabitants of the same district and indispensable defendants do not reside in the same state. The statute says: "Except as provided . . . no civil suit shall

<sup>21</sup> *Gracie v. Palmer*, 8 Wheat. 699; *Toland v. Sprague*, 12 Pet. l. c. 330; *ex parte Schollenberger*, 96 U. S. 369; *St. Louis, Etc., R. R. Co. v. McBride*, 141 U. S. 127; *Interior Construction Co. v. Gibney*, 160 U. S. 217; *In re Moore*, 209 U. S. 490; *Western, Etc., Co. v. Butte Co.*, 210 U. S. 368; *Kreigh v. Westinghouse Co.*, 214 U. S. 249. The rule is the same where a cause is removed by the defendant to a federal court, and neither party is a resident of the district. See *In re Moore*, *supra*.

<sup>22</sup> *T. & P. Ry. Co. v. Cox*, 145 U. S. 593; *Cf. First Nat. Bank v. Morgan*, 132 U. S. 141.

be brought by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded *only* on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”<sup>23</sup>

In interpreting this statute the courts have held that the terms “plaintiff” and “defendant” are, in cases of plurality, used collectively; that is, every co-plaintiff is included in the term plaintiff, so that frequently there is no one district in which all the plaintiffs reside, and consequently no one district which can be said to be by the residence of the collective plaintiff; and similarly with respect to defendants.<sup>24</sup>

The terms “whereof he is an inhabitant” and “of the residence” are synonymous.<sup>25</sup>

Whenever, therefore, in such instances, there is no waiver and the particular case does not fall within one of the other exceptions, there is an effective bar against the exercise of jurisdiction.

§ 6. **Dispensability of Party—Statute.**—In order so far as possible to avoid a failure of federal justice upon this ground, it is provided by Section 50 of the Judicial Code as follows:

“When there are several *defendants* in any suit at law or in equity and one or more of them are neither inhabitants of, nor found within, the district in which the suit is brought and do not voluntarily appear, the court may entertain jurisdiction and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or preju-

<sup>23</sup> J. C., Sec. 51.

<sup>24</sup> *Smith v. Lyon*, 133 U. S. 315; *Greeley v. Lowe*, 155 U. S. 58; *McAuley v. Moody*, 185 Fed. 144; *Lengel v. American Smelting Co.*, 110 Fed. 19.

<sup>25</sup> *Ex parte Shaw*, 145 U. S. 444.

dice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matters of abatement or objection to the suit.”

The primary purpose of the act is said to have been to rid the courts of the decision in *Strawbridge v. Curtis*,<sup>26</sup> which had held that all parties jointly interested must be joined.<sup>27</sup> It relates solely to the non-joinder of defendants who are not within the reach of the process of the court, and does not affect any case where persons are not joined because their citizenship is such as to defeat the jurisdiction.<sup>28</sup>

Where the obligation owed by the defendants is joint, and the defendants are citizens of different states, an action at law may be brought and prosecuted to judgment in the federal court against one or more of the obligors, under this statute, without prejudicing in any way the rights of the absent defendants.<sup>29</sup>

In equity cases it confirms the power of the court to dispense with all parties defendant out of the reach of process, whose interests are not so inseparably connected with the claim of the parties before the court, as to render it impossible to make a decree doing final and complete justice between the parties before the court without substantially affecting the rights of those not served.<sup>30</sup>

So far as equity cases are concerned, the statute enacts what had, to a very great extent, already been the prior practice of federal courts of equity.<sup>31</sup> It would be highly unsafe to say, however, that in *all* cases a defendant in equity, jointly interested, might be omitted because out of the juris-

<sup>26</sup> 3 Cranch. 267.

<sup>27</sup> *Ober v. Gallagher*, 93 U. S. 199.

<sup>28</sup> *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore*, 6 Wall. 280.

<sup>29</sup> *Clearwater v. Meredith*, 21 How. 489.

<sup>30</sup> *Shields v. Barrow*, 17 How. 130; *California v. Southern Pac. Co.*, 157 U. S. 1. c. 250.

<sup>31</sup> *Shields v. Barrow*, 17 How. 130.

diction. The right to omit would seem to depend upon the separableness of his interests.<sup>32</sup>

§ 7. **Dispensability of Party—Rule of Court.**—In further endeavor to aid the jurisdiction of federal courts of equity it is (and long has been) provided by what is now Equity Rule 39, as follows: “In all cases where it shall appear to the Court that persons who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of being out of the jurisdiction or otherwise incapable of being made parties, or because their joinder would oust the jurisdiction of the Court as to the parties before it, the Court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree of the Court shall be without prejudice to the rights of the absent parties.”

This rule applies to both plaintiffs and defendants. Parties in equity may be divided into three classes, viz., formal or nominal, necessary and indispensable parties.<sup>33</sup>

By formal or nominal parties is here meant those who have no real or substantial interest in the *controversy* before the court, although they may have such an interest in the subject-matter. They are frequently of a quasi-representative character, whose principals have been brought in. Such parties cannot, ordinarily, by their presence or absence, oust the federal courts of their rightful jurisdiction to adjudicate the actual controversy.<sup>34</sup>

By necessary parties is meant those who have a real and substantial interest in the *controversy*, but of a character so separable, that a decree can be justly made between the other parties, without prejudicing or foreclosing their rights. It is to this class of parties that the equity rule just quoted refers. They may be omitted from the bill because of their ab-

<sup>32</sup> Cf. *Cameron v. M'Roberts*, 3 Wheat. 59; *Waterman v. Canal Bank*, 215 U. S. 33; *Minnesota v. Northern Sec. Co.*, 184 U. S. 199.

<sup>33</sup> *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore*, 6 Wall. 280; *Minnesota v. Northern Securities Co.*, 184 U. S. 199.

<sup>34</sup> Cf. *Wormley v. Wormley*, 8 Wheat. 420; *Russell v. Clarke's Executors*, 7 Cranch. 98; *Wood v. Davis*, 18 How. 467; *Bacon v. Rives*, 106 U. S. 99; *Walden v. Skinner*, 101 U. S. 577.



sence from the jurisdiction, and a decree passed between the remaining parties.

But where an absent party is indispensable, i. e., where his interest in the *controversy* is not separable and no decree can be made that will quiet the question between the others, without necessarily affecting his interests, the local limitation operates as an effective bar to jurisdiction, and the parties must be remitted to some other court.<sup>35</sup>

§ 8. **Actions of a Local Nature.**—By far the most important exception to the general rule of venue is with respect to certain actions of a local nature. “The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws, which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was so expressly declared.”<sup>36</sup>

While, owing to the peculiar phraseology of Section 51 of the Judicial Code (and to the fact that Section 57 thereof is apparently not broad enough to cover all actions local at common law), I have had some doubts upon the subject,<sup>37</sup> I am of the opinion that local actions are not included within the rules heretofore laid down; and that they may (and must) be brought within the district where the cause of action actually arose, or the property to be affected is situated, unless otherwise especially provided by a statute particularly referring to the subject-matter.<sup>38</sup>

So far as I am aware, the statutes of the United States contain no express provision commanding the observance of the general common-law rule of venue with respect to local actions; but such a rule is implied, as above stated. Some of the statutes do refer to “actions of a local nature,” and

<sup>35</sup> See the discussion in Chap. X, *infra*.

<sup>36</sup> *Casey v. Adams*, 102 U. S. 66; *Cf. Northern, Etc., R. R. Co. v. R. R. Co.*, 15 How. 1. c. 242; *Mississippi, Etc., R. R. Co. v. Ward*, 2 Black. 485; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105; *McKenna v. Fisk*, 1 How. 241.

<sup>37</sup> *Cf. Greeley v. Lowe*, 155 U. S. 58.

<sup>38</sup> *Cf. Kentucky Lands Co. v. Mineral Co.*, 219 Fed. 45.

except them from the operation of other general rules, as in Sections 52 and 53 of the Judicial Code. It is further provided by Section 54 of the Judicial Code that “*in suits of a local nature*, where the defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final processes against him, directed to the marshal of the district in which he resides.” Section 55 provides that in any *suit of a local nature*, at law or in equity, where the land or other subject-matter of a fixed character lies partly in two districts in the same state, the court in either district shall have jurisdiction.

Even where the action is strictly local in character and the suit must be filed in the local district, service must still be had upon the defendants within that district, except as otherwise provided by special statutes; for, in the absence of statutory provision, the court cannot send its process into another district, as we shall hereafter observe.<sup>39</sup>

There is considerable contrariety and discordance in the decisions of various jurisdictions as to whether particular forms of actions are to be regarded as local or transitory; but there is a disposition in the federal courts to follow state rules in that regard.<sup>40</sup>

**§ 9. Lien Upon or Claim to Property in District—Publication.**—In order to avoid the obstruction of the jurisdiction of the federal courts by reason of the general inability to serve process out the district, it is provided by Section 57 of the Judicial Code that whenever “*in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought,*” one or more of the defendants therein shall not be an inhabitant of or found within the said district or shall not voluntarily appear thereto, it shall be lawful for the court to make an order di-

<sup>39</sup> Cf. *Cely v. Griffin*, 113 Fed. 981; *Winter v. Koon*, 132 Fed. 273.

<sup>40</sup> *Potomac, Etc., Co. v. B. & O. R. R. Co.*, 217 Fed. 665; *Peyton v. Desmond*, 129 Fed. 1.

recting such absent defendant or defendants, to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct not less than once a week for six consecutive weeks.

This statute, taken together with the general rules as to venue, would seem to embody a scheme of federal jurisdiction, and to exclude from any operation in the federal courts state statutory provisions for notice by publication.<sup>41</sup>

It should be especially observed that this statute taken by itself, refers only to suits commenced in a court of the United States. Inasmuch as statutes providing for substituted service are always strictly construed, it seems that it has no reference to removal proceedings, where the suit is commenced, strictly speaking, in the state court.<sup>42</sup>

Section 38 of the Judicial Code, however, provides that the District Court shall in all suits removed thereto, proceed therein just as if the suit had been originally commenced in the District Court; and it is not impossible to hold that this annexes to removed causes all incidents of those originally begun in the District Court, including the power of publication.

It is further provided by Section 57 that the effect of notice shall be to confer jurisdiction, *with respect to the particular property*, over the absent defendant in like manner as if served in the district, but the right is granted to those not personally served with notice, to set aside the judgment by petition within one year from the rendition thereof.

It seems to me that there are actions local in their nature which are outside of the provisions of Section 57; and that

<sup>41</sup> Bracken v. Union Pac. Ry., 56 Fed. 447; Bauman v. Hart, 192 Fed. 498.

<sup>42</sup> Wooldridge v. McKenna, 8 Fed. 650.

there are actions not strictly local within the common-law meaning of that word, which are included therein.

It is plain that the lien, claim or encumbrance referred to in the statute should be one existing anterior to the filing of the action, and not one that is the effect, present or prospective, of the suit itself. Thus the statute has never been applied to attachment proceedings; but it has constantly been held, in original proceedings, that the District Court of the United States has no jurisdiction in attachment, unless the defendant is an inhabitant of, or is found within, the district of suit, in accordance with the general rule.<sup>43</sup> The statute applies to legal claims as well as equitable; though the latter constitute the more numerous instances. The tendency seems to be toward a liberal interpretation of the statute in favor of interests deemed to be held in trust and equitable claims and rights generally.

The following, among many other instances of its application, may be cited: A suit by heirs to set aside the lien of probate judgments claimed to have been fraudulently procured;<sup>44</sup> a bill in equity by a judgment creditor to subject defendants' secret interests in lands to the operation of the judgment;<sup>45</sup> a suit to remove cloud from title, though based upon state remedial statute;<sup>46</sup> a suit for the cancellation of liens upon and the partition of real property;<sup>47</sup> a suit by a creditor, brought to subject the assets of an insolvent corporation (constituting a trust fund for the payment of its debts) to the payment of his claim, and to remove a cloud upon such assets arising from an invalid mortgage;<sup>48</sup> a bill

<sup>43</sup> Toland v. Sprague, 12 Pet. 300; *Ex parte* Des Moines, Etc., Co., 103 U. S. 794; La Borde v. Ubarri, 214 U. S. 173; Dormitz v. Bridge Co., 6 Fed. 217; Noyes v. Canada, 30 Fed. 665; Harland v. Telegraph Co., 40 Fed. 308; Cf. Jones v. Gould, 149 Fed. 153.

<sup>44</sup> McDaniel v. Traylor, 196 U. S. 415.

<sup>45</sup> Perez v. Fernandez, 220 U. S. 224.

<sup>46</sup> Dick v. Foraker, 155 U. S. 404; L. & N. R. R. Co. v. Western Union Co., 234 U. S. 369; Arndt v. Griggs, 134 U. S. 316.

<sup>47</sup> Greeley v. Lowe, 155 U. S. 58.

<sup>48</sup> Mellen v. Moline, Etc., Works, 131 U. S. 352.

to establish an equitable right to trust funds held within the jurisdiction of the court.<sup>49</sup>

The personal property mentioned in the statutes must have its *situs* within the district; but the statute is not limited to *tangible* property alone. A suit to remove a cloud or incumbrance from the title to shares of stock may be maintained, and publication had therein, in the district where the corporation has its principal office and transfer books, when by the laws of the state creating the corporation, that is to be regarded as the *situs* of the stock.<sup>50</sup>

It is even held that in a suit brought by stockholders in a corporation, in behalf of themselves and others, to cancel deeds and leases fraudulently made, whereby the properties of the corporation within the district are held and managed in behalf of adverse interests, and to the destruction of the shareholders' rights, the non-resident persons interested in and claiming under such deeds and leases may be brought in by publication.<sup>51</sup>

On the other hand, it is held that the right to enjoy one's property free from nuisance, and to have an existing nuisance (situated outside the district) abated, is not a *claim* to property within the publication act;<sup>52</sup> and a merely *constructive* possession within the state, of assets undergoing administration in a state probate court, where in fact such assets are physically outside the jurisdiction, is not enough.<sup>53</sup>

**§ 10. Property in Two Districts—Transfer Between Divisions.**—There are other provisions whereby in certain cases of obvious propriety, the action may be originally brought in or transferred to another division or district from that prescribed by the general rule. I have already called to your attention in another connection Sections 54 and 55 of the Judicial Code. It is also provided by the publication

<sup>49</sup> Goodman v. Niblack, 102 U. S. 556.

<sup>50</sup> Jellinek v. Huron Copper Co., 177 U. S. 1.

<sup>51</sup> Citizens Savings, Etc., Co. v. Ill. Cent. R. R. Co., 205 U. S. 46.

<sup>52</sup> Ladew v. Copper Co., 218 U. S. 357.

<sup>53</sup> Chase v. Wetzlar, 225 U. S. 79.

statute (Sec. 57 J. C.) that when, a part of the real or personal property, against which the proceedings are directed lies within two or more districts within the same state, suit as provided may be validly brought within either district.

In order to prevent delays, and to subserve the convenience of the parties, it is also provided that any civil cause in law or equity, on written stipulation of the parties, or their attorneys, concurred in by the Judge in vacation or the court in term, may be transferred from one division to another in the same district for trial, regardless of the residence of the parties; and the original papers with certified copies of the record of the entries are thereupon transmitted to the clerk of the new division to which the cause is assigned.<sup>54</sup>

Manifestly, transfer may be sometimes requisite upon the creation of a new district or division, or a change in the boundaries of the old, and provision is made therefor.<sup>55</sup>

A new feature introduced by the Judicial Code is the disqualification, upon affidavit of bias or prejudice, of the Judge before whom a cause is pending;<sup>56</sup> but in civil cases there is no change of venue from district to district, or division to division, on account of the alleged prejudice of the inhabitants of the locality. In criminal cases, however, the Court may transfer, by request of the defendant, a criminal cause from one division to another in the same district.<sup>57</sup>

**§ 11. District Ordinarily Limit to Exercise of Jurisdiction—Exceptions.**—As a general rule, where a court is established for a particular county, district or other territorial subdivision, its judicial power and authority are impliedly coincident with such territory. In the absence of statutory provision to the contrary, the valid judgments, orders and process of a District Court of the United States are inher-

<sup>54</sup> J. C., Sec. 58.

<sup>55</sup> J. C., Secs. 59, 60.

<sup>56</sup> J. C., Sec. 21.

<sup>57</sup> J. C., Sec. 53.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ently binding and enforceable by the authority of the court everywhere within its district, but not outside thereof.<sup>58</sup>

In addition to the exceptions to this rule we have noted in preceding paragraphs, I may point out that an execution upon a judgment of the District Court runs throughout the state wherein the judgment was rendered.<sup>59</sup>

In criminal causes, the Court may validly command the attendance of witnesses from any portion of the United States, and in civil causes, from its own or any other district, provided (as a general rule) that no witness can be compelled to attend a civil hearing outside his district, when he resides more than one hundred miles from the place of trial.<sup>60</sup>

When it is necessary to enforce the judgment of a District Court outside the state in which it was rendered, it seems necessary to bring an independent action thereon, just as upon a judgment of any foreign jurisdiction; but the statute provides that executions upon a judgment for the use of the government run throughout the United States.<sup>61</sup>

In general, the lien of judgments or decree of a District Court extends only so far as could (under the same conditions) the lien of a judgment rendered by a state court of general jurisdiction sitting at the place of rendition; and it is not, therefore, ordinarily *ex proprio vigore* coextensive with the district.<sup>62</sup>

Where a receiver is appointed for land or subject-matter of a fixed character, lying within different districts of the same state, the orders and judgments of the court concerning the administration of the property embraced in the receivership run throughout all such districts;<sup>63</sup> and where

<sup>58</sup> Toland v. Sprague, 12 Pet. 300; Barrett v. U. S., 169 U. S. 1. c. 221; Morrill v. American, Etc., Co., 151 Fed. 1. c. 320; Great Western, Etc., Co. v. Harris, 198 U. S. 561; U. S. v. Alberty, Hempstead 444.

<sup>59</sup> R. S. 985.

<sup>60</sup> R. S. 876.

<sup>61</sup> R. S. 986.

<sup>62</sup> 25 Stat. 357; Act of Aug. 1, 1888; Cf. Act of Aug. 23, 1916.

<sup>63</sup> J. C., Sec. 55; East Tenn., Etc., Co. v. Atlantic Co., 49 Fed. 608; Horn v. Pere Marquette Co., 151 Fed. 626.

such property lies within different states in the same judicial circuit, the receiver appointed, upon giving bond, is immediately vested with control and jurisdiction over all the property within the judicial circuit; subject to disapproval of the order of appointment within thirty days by the Circuit Court of Appeals, or a Judge thereof, upon reasonable notice; and provided, that within ten days a certified copy of the bill and appointment is filed with the District Court of each district wherein any of such property is situated. In the event of the appointment of such receiver, process and orders run throughout the circuit, but there must be record entries in each district.<sup>64</sup> Other special provisions exist, with respect to particular subject-matter.<sup>65</sup>

§ 12. **Personal Presence in District—Process on Corporations.**—Since the service of process on the person conditions so vitally the jurisdiction of a District Court, we must discuss “residence” or being “found” within a district. It is fundamental (involving due process of law) that to obtain jurisdiction of the person, natural or artificial, there must (in the absence of waiver by appearance or otherwise) be service of process upon such person within the territorial jurisdiction; or (what is the same thing) upon a person deemed to constitute the agent or *alter ego* of such person for the purpose of such service.<sup>66</sup>

The question whether such person has so been made subject, for the purpose of the particular action, to the mandate of the court, is a question of jurisdiction; and upon questions affecting their jurisdiction the federal courts must decide for themselves, as a matter of general right and justice.<sup>67</sup>

A natural individual has bodily presence, and this obviates most such questions. Whether or not, in the absence of stat-

<sup>64</sup> J. C., Sec. 56.

<sup>65</sup> Cf. 33 Stat. 729, relating to trade-marks; 38 Stat. 220, commerce cases; 38 Stat. 736, anti-trust laws; 35 Stat. 1084, copyright cases.

<sup>66</sup> *Goldey v. Morning News Co.*, 156 U. S. 1. c. 521.

<sup>67</sup> *Mechanical Appliance Co. v. Castleman*, 215 U. S. 1. c. 443.



ute, service of process can be validly made upon the agent of an absent individual, where such agent has, by contract between the parties, been especially and solemnly appointed to receive and accept such service, is an interesting question, which under our customs can seldom arise. It seems to be permissible in Great Britain.<sup>68</sup> State statutes nearly always provide for substituted service upon a member of the household of a resident of the state, and such service is universally treated as validly founding a personal judgment. Particular federal statutes and rules of court provide for similar means of service.<sup>69</sup>

The usual controversy in the cases under discussion is with respect to corporations. A corporation is conclusively presumed to be a citizen and resident of the state by which it is created;<sup>70</sup> and the laws of the state of its creation usually designate the persons who shall be deemed to be and represent the corporation within that state for purposes of the service of process. Where there is more than one district in a state, the district wherein is the principal office is treated as the residence of a domestic corporation.<sup>71</sup>

It was the common-law rule (based upon the intangible, incorporeal theory) that a foreign corporation was not migratory, and could not be sued in a personal action outside the state of its creation; so that there was no method, at common law, of serving process upon a foreign corporation.<sup>72</sup> It is now more generally held that when a corporation embarks in business in a foreign state, or sends there its agents to carry on, in its behalf and stead, some or all of the activities within its chartered powers, it is for all practical purposes, apart from its internal government, as tangibly and corporeally present in such state as in the state by which it was chartered.

<sup>68</sup> *Montgomery v. Liebenthal*, 67 L. J. Q. B. 313.

<sup>39</sup> R. S. 914; Equity Rule 13; Cf. 35 Stat. 1084; Sec. 35.

<sup>70</sup> *Ex parte Shaw*, 145 U. S. 444.

<sup>71</sup> *Galveston v. Gonzales*, 151 U. S. 496.

<sup>72</sup> *St. Clair v. Cox*, 106 U. S. 350.

**§ 13. Corporation Must be Doing Business in State.—**

It seems clear that where a corporation is not *doing business* within a foreign state, and has no agent or officer therein, it can on no just theory be considered as *found* within that state. "It has frequently been held," says the Supreme Court, "in this court, that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the state of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent."<sup>73</sup>

The precise difficulty is in laying down, first, an accurate and comprehensive rule as to what activities shall be sufficient to support the legal inference of corporate presence—so constitute *doing business*—within the state; and second, a short and thorough-going definition connoting those agents or representatives who so typify or support the corporate personality as to warrant, under a reasonable system of jurisprudence, the legal inference that process served upon them reaches—is in effect served upon—the corporation itself.

**§ 14.—Service Upon Foreign Corporations.—**At common law, in the absence of statute, service was made upon such head officer of a domestic corporation as brought home knowledge of the process to the corporation.<sup>74</sup>

There are many state holdings to the effect that the courts of a state cannot assume jurisdiction over the person of a foreign corporation, unless its common-law immunity has been destroyed by a statute authorizing the service of process upon it.

If the federal courts accepted this rule, it would, for the moment, very seriously curtail their jurisdiction. There is no general federal statute expressly providing for such matters. Section 914 of the Revised Statutes, which is known as the Conformity Act, assimilates practice at law in the

<sup>73</sup> Herndon-Carter Co. v. Norris, 224 U. S. 1. c. 499; Peterson v. Chicago, Etc., R. R. Co., 205 U. S. 1. c. 390; Goldey v. Morning News Co., 156 U. S. 518; St. Clair v. Cox, 106 U. S. 350.

<sup>74</sup> Kansas City, etc., Co. v. Daughtry, 138 U. S. 298.

§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

federal courts to the practice of the state courts; and this includes the service of process in law actions. The Conformity Act has no relation, however, to equity causes; nor is process upon corporations covered by the Equity Rules; so that, if the common-law rule were to be followed, there would now be absolutely no way to sue a foreign corporation in a federal court of equity.\* Furthermore, in actions at law, if the state statute permitting service (and adopted by federal courts of law pursuant to R. S. 914) were so broad as to be contrary to due process of law, or should be for any other reason invalid, the federal courts might be equally helpless.

It is, therefore, the law in the federal courts that a *statute* is not a prerequisite to their exercise of jurisdiction over a foreign corporation;<sup>75</sup> but such state statutes are almost invariably found, and are followed by federal courts, both of law and equity, provided they be not in conflict with federal laws and are valid and reasonable.<sup>76</sup>

§ 15. **Doing Business—What Amounts to.**—Turning aside for a moment to consider what constitutes *doing business*, it would seem that each case must depend upon its own facts.<sup>77</sup> There are many cases, most of them in the inferior courts, and instances arise which are hard to distinguish. Without any attempt to set off contraries, in the following cases the Supreme Court has held that the corporation *was* doing business:

(a) Traveling agents continuously solicited orders, which were to become valid only when accepted at the home office in another state; machines so ordered were constantly shipped and delivered to purchasers, pursuant to such orders; the

<sup>75</sup> Wilson Packing Co. v. Hunter, 8 Bissell 429; Hayden v. Androscoggin Mills, 1 Fed. 93; Barrow Steamship Co. v. Kane, 170 U. S. 100.

<sup>76</sup> Cf. Amy v. Watertown, 130 U. S. 310; U. S. v. Schollenberger, 96 U. S. 369.

<sup>77</sup> St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 1. c. 227; International Harvester Co. v. Kentucky, 234 U. S. 1. c. 583.

traveling agents accepted periodical payments, either in cash or notes payable at local banks.<sup>78</sup>

(b) A railroad company, operating a line from Missouri to Texas, maintained an office in New York, with its name upon the door; and door, letterheads and advertising literature named certain persons as general and traveling freight agents. The plaintiff lost some freight, entered into correspondence and negotiations with said agents for adjustment and compromise of his loss. After some negotiation, the attempt at settlement failed. Apparently these were characteristic and usual activities.<sup>79</sup>

(c) An insurance company was engaged in insuring property against loss by fire in a particular state, and in such state were located nearly one-third of its risks. It maintained no office there, but constantly sent out circulars through the mails, soliciting insurance; customarily sent its general manager into the state to attend all lumbermen's conventions, for the purpose of obtaining insurance contracts; and sent out adjusters whenever a loss occurred.<sup>80</sup>

(d) A life insurance company withdrew from a state and canceled its agencies, leaving a number of policies outstanding, upon which it continued to collect premiums and settle claims. This was done, however, through its agent in a neighboring state. One of the old policyholders died, and the company sent one of its adjusters to examine into and compromise the claim, which he was unable to do.<sup>81</sup>

(e) So-called elevator company, resident in Indiana, leased wires to various points, such wires terminating in offices of so-called "correspondents." Over these wires elevator company continuously transmitted market quotations, which were charged to have been stolen from plaintiffs. Traders at correspondent offices would give orders to buy or sell stocks or grain, which were transmitted to elevator company as orders

<sup>78</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 1. c. 583.

<sup>79</sup> *St. Louis S. W. Ry. Co. v. Alexander*, 227 U. S. 218.

<sup>80</sup> *Pennsylvania, etc., Co. v. Meyer*, 197 U. S. 407.

<sup>81</sup> *Connecticut Mutual Co. v. Spratley*, 172 U. S. 602; *Cf. Mutual Accident Ass'n v. Davis*, 213 U. S. 245.

of correspondent, who (according to the contract between the parties) was to be solely responsible. The lease of the wires, however, referred to the "correspondent's" office as the office of the elevator company, and it was plain that the rent of the telegraph wires was a subterfuge to cover a charge of commissions upon each trade. The suit was brought at the location of a "correspondent."<sup>82</sup>

On the other hand, in the following instances, there was no doing of business:

(a) A railroad company operated a line west from Chicago. It hired A as its district freight and passenger agent, and established him in Philadelphia, and advertised to the public his connection. His business was to solicit and procure freight and passengers for defendant railroad company's line. He employed several clerks and a number of traveling freight agents. When passengers sought tickets, he gave a prepaid order for delivery of the same at Chicago, but occasionally sold reduced rate tickets to railroad employes. He sometimes gave a bill of lading over defendant's line in exchange for one issue by initial line. The process was served in Philadelphia.<sup>83</sup>

(b) An insurance company decided to withdraw from a state, discharged its agents and revoked its designation of the insurance commissioner to accept process. It had in force a considerable number of policies, upon which it continued to receive premiums, and thereafter rewrote one policy, adjusted two old claims, and sent a check in payment of a policy to be delivered upon payment of certain unpaid assessments.<sup>84</sup>

(c) A suit cannot be maintained against a foreign corporation, merely because it completely controls a domestic corporation through stock ownership, and employs the same persons.<sup>85</sup>

<sup>82</sup> *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424.

<sup>83</sup> *Green v. Chicago, etc., Ry. Co.*, 205 U. S. 530.

<sup>84</sup> *Hunter v. Mutual Reserve, etc., Co.*, 218 U. S. 573.

<sup>85</sup> *Peterson v. Chicago, etc., Ry. Co.*, 205 U. S. 364.

(d) A foreign corporation owned lands, and brought a number of suits to redress trespasses thereon, and the president sometimes rode through the state on the train.<sup>86</sup>

§ 16. **Service on Agents—State Statutes.**—It is clear that the mere presence of an agent is not enough. He must be present in his capacity as agent—upon the affairs of the corporation.<sup>87</sup>

But service of process, in accordance with a state statute, upon a resident director is valid, if the corporation is doing business within the state.<sup>88</sup>

State statutes frequently require as a condition precedent to doing business by a foreign corporation that it designate an agent within the state who shall be deemed to represent the corporation for the purpose of accepting service of process. So long as the doing of business continues and such designation remains unrevoked, it is clear that service upon an agent would be sufficient in the federal as well as in the state courts. Such statutes sometimes expressly provide for and are sometimes interpreted as, coupling the agency with a contractual interest in favor of those having transactions with the corporation in the state prior to withdrawal and cancellation of the agency, so that it becomes irrevocable with respect to actions growing out of such transactions.<sup>89</sup> Such a formal appointment and express designation is not necessary. Where a state has enacted statutes regulating the method of serving foreign corporations, such a corporation by entering or remaining in the state may well be deemed to assent during its stay to the agency for the reception of

<sup>86</sup> *New Mexico v. Baker*, 196 U. S. 432.

<sup>87</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 1. c. 583; *Peterson v. C. R. I. & P. Ry. Co.*, 205 U. S. 364; *Remington v. Central Pac. Rld. Co.*, 198 U. S. 95; *Conley v. Mathieson Co.*, 190 U. S. 406; *Geer v. Mathieson Co.*, 190 U. S. 428.

<sup>88</sup> *Pennsylvania, etc., Co. v. Meyer*, 197 U. S. 407.

<sup>89</sup> *Mutual Reserve Co. v. Hunter*, 218 U. S. 573; *Mutual Association v. Phelps*, 190 U. S. 147; *U. S. v. Schollenberger*, 96 U. S. 369.

process pointed out by the statute, provided that such statute be not contrary to basic requirements.<sup>90</sup>

It has been recently held, however, that the power to pass a statute of that sort, which relates to foreign transactions and authorizes the whole world to make that state a mecca for litigation, is beyond the competence of the state.<sup>91</sup> It is certain that the construction of such a statute will, wherever possible, be held limited to domestic affairs.<sup>92</sup>

§ 17. **Doing Business and Service on Agent in District Necessary.**—If we apply to the district, the same rules we apply to the state, with respect to corporate presence therein, it follows that the corporation must be served in the district to warrant personal judgment; and this would involve the *doing business* within the *district* and the presence *therein* of an agent representing the corporation. If there were no valid state statutes, assented to expressly or impliedly by the particular corporation, which provide otherwise, this would, I think, unquestionably be the rule. It is true that the assent imputed to the corporation under state statutes inures to the federal as well as the state courts.<sup>93</sup>

The federal statute says that where the jurisdiction is founded only on the fact that the action is between citizens of different states, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Nothing is here said as to the defendant being found within either district; but this is plainly implied. The jurisdiction, on general principles, is only coextensive with the district; exceptions providing for service outside the district are expressly made, and the *maxim expressio unius exclusio alterius* is applicable.<sup>94</sup> State statutes cannot change the law as to the jurisdiction of the federal courts.<sup>95</sup>

<sup>90</sup> *Lafayette Ins. Co. v. French*, 18 How. 404; *St. Clair v. Cox*, 106 U. S. 350.

<sup>91</sup> *Simon v. Southern Ry. Co.*, 236 U. S. 115.

<sup>92</sup> *Old Wagon, etc., Ass'n v. McDonough*, 204 U. S. 8.

<sup>93</sup> *U. S. v. Schollenberger*, 96 U. S. 369.

<sup>94</sup> *Toland v. Sprague*, 12 Pet. 300.

<sup>95</sup> *Railroad Co. v. Denton*, 146 U. S. 202.

As a matter of sound principle, therefore, the rule ought to be with the district just as with the state; and both doing business and service upon an agent *within the district* ought to be necessary.<sup>96</sup>

Nevertheless, we must remark that the Supreme Court has been exceedingly sparing in its enunciation of the rule. Where a state statute provides that a foreign corporation, doing business in a state, is subject to suit in every county in the state, no matter where served, such statute will be applied by the federal courts sitting in that state, upon removal, after service in the state court.<sup>97</sup> This, however, is plainly explicable on the ground (hereafter to be set forth) that nothing is lost by removal.

<sup>96</sup> *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530; *Tierney v. Helvetia, Etc., Co.*, 163 Fed. 82; *Meche v. Valley Mining Co.*, 89 Fed. 114; *Wange v. Public Service Co.*, 159 Fed. 189; *Westinghouse v. Publishing Co.*, 110 Fed. 254.

<sup>97</sup> *New York, etc., Co. v. Estill*, 147 U. S. 591.



## **CHAPTER III.**

### **DISTRICT COURTS—SUBJECT-MATTER OF JURISDICTION.**

- § 1. The Classification of the Jurisdiction.
- 2. Civil Proceedings By or Against the United States or An Officer Thereof.
- 3. Crimes, Penalties and Forfeitures.
- 4. Commerce and Immigration.
- 5. Revenue and Duties.
- 6. Governmental Privileges.
- 7. Civil Rights.
- 8. Admiralty, Prize and Seizures.
- 9. Miscellaneous Instances.
- 10. Assignment—Exceptions to Limitation.
- 11. Assignment—Chose in Action.
- 12. Who Are Assignees—Pleading and Proof.
- 13. Suits Arising Under Constitution, etc. Opening Pleading Must Show.
- 14. Cases Under Constitution, Laws or Treaties—Real Involution—Dismissal.
- 15. Federal Corporations—Federal Officers.
- 16. Diverse Citizenship—What Constitutes.
- 17. Diverse Citizens—Corporate Bodies.
- 18. Diverse Citizens—Consolidated or Domesticated Corporations.
- 19. The Same—Continued.
- 20. The Same—Continued.
- 21. Diverse Citizens—Partnerships—Boards, etc. Suit By Stockholder.
- 22. Diverse Citizens—Real and Nominal Parties.
- 23. Diverse Citizens—Fraudulent Transfers and Removals.

§ 1. **The Classification of the Jurisdiction.**—Having paid some notice to the territorial aspects of jurisdiction, we shall now consider the extent of the jurisdiction of the District Courts with respect to subject-matter. Cases reach the District Court in three ways: (1) By appeal, (2) by original institution, and (3) by removal. The appellate jurisdiction is very slender. It includes review of the judgments and

orders of United States commissioners in cases arising under the Chinese exclusion laws, and a few special matters such as appeals from convictions before the commissioners for Yellowstone National Park, or of the Hot Springs Reservation, or from the commissioners appointed to award damages for rights-of-way through Indian reservations.<sup>1</sup>

By the term original jurisdiction is meant the power to to initiate, as well as hear and determine, the formal controversy. The classification of the original jurisdiction of the District Court is a matter of considerable difficulty. Taking the enumeration in the Judicial Code (which is not entirely complete) as a basis of the classification, I have concluded to divide it into two great classes: (1) Those cases where the jurisdiction exists, no matter how small may be the pecuniary amount of the controversy, and (2) cases where the involution of a minimum amount is essential to the jurisdiction. The first class includes the following subordinate groups: (A) Civil proceedings by or against the United States or an officer thereof; (B) crimes, penalties and forfeitures; (C) commerce and immigration; (D) revenue and duties; (E) governmental privileges; (F) civil rights; (G) admiralty, prize and seizures; and (H) miscellaneous proceedings.

Under the second class will be treated those cases where the matter in controversy exceeds, exclusive of interest or costs, the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made under their authority or (b) is between citizens of different states; or (c) is between citizens of a state and foreign states, citizens or subjects.

It is not to be claimed that this classification is scientific; but the demand for a classification that shall be more than a mere catalogue is urgent, from the student's standpoint, and the one set forth is the best and clearest I have been able to evolve. An absolutely logical classification is inher-

<sup>1</sup> J. C. § 25; J. C. § 26; 33 Stat. 188; 34 Stat. 1218; 30 Stat. 991.

§ 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ently impossible, under existing statutes, because the various clauses are not mutually exclusive of each other.

§ 2. (A) **Civil Proceedings by or Against the United States or an Officer Thereof.**—This group contains the following instances: (1) All suits of a civil nature, at common law or in equity, brought by the United States or any officer thereof authorized by law to sue.<sup>2</sup>

(2) All cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for the winding up of such bank; and all suits brought by such banking association to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided by the "National Banks" title of the revised statutes.<sup>3</sup>

(3) Proceedings in equity to enjoin unlawful inclosure of public lands.<sup>4</sup>

(4) Suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants.<sup>5</sup>

(5) Claims against the United States, of such character as are justiciable in the Court of Claims, and all set-offs, counterclaims or other demands, including claims for damages, asserted by the government against the claimant in such proceedings; provided that no suit to recover fees, salary or compensation for official services may be entertained hereunder, nor any claim exceeding ten thousand dollars.<sup>6</sup>

§ 3. (B) **Crimes, Penalties and Forfeitures.**—Included hereunder are:

(1) All crimes and offenses cognizable under the authority of the United States.<sup>7</sup>

<sup>2</sup> J. C. § 24, cl. 1.

<sup>3</sup> J. C. § 24, cl. 16.

<sup>4</sup> J. C. § 24, cl. 21.

<sup>5</sup> J. C. § 24, cl. 25.

<sup>6</sup> J. C. § 24, cl. 20.

<sup>7</sup> J. C., § 24, cl. 2.

DISTRICT COURTS—SUBJECT-MATTER OF JURISDICTION. § 5

(2) All suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.<sup>8</sup>

§ 4. (C) **Commerce and Immigration**, embracing:

(1) All suits and proceedings arising under any law regulating commerce.<sup>9</sup>

(2) All suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.<sup>10</sup>

(3) All suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.<sup>11</sup>

(4) All suits arising under laws relating to the slave trade.<sup>12</sup>

§ 5. (D) **Revenues and Duties**.—Included within which are:

(1) All cases arising under any law providing for internal revenue, or for revenue from imports or tonnage, except those cases under laws providing for revenue from imports, whereof jurisdiction is conferred upon the Court of Customs Appeals.<sup>13</sup>

(2) All suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.<sup>14</sup>

(3) All suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of its revenues.<sup>15</sup>

<sup>8</sup> J. C. § 24, cl. 9.

<sup>9</sup> J. C. § 24, cl. 8; 38 Stat. 219.

<sup>10</sup> J. C. § 24, cl. 23.

<sup>11</sup> J. C. § 24, cl. 22.

<sup>12</sup> J. C. § 24, cl. 4.

<sup>13</sup> J. C. § 24, cl. 5.

<sup>14</sup> J. C. § 24, cl. 9.

<sup>15</sup> J. C. § 24, cl. 11.

§ 7 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

§ 6. (E) **Governmental Privileges.**—I have grouped under this designation:

- (1) All cases arising under the postal laws.<sup>16</sup>
- (2) All suits at law or in equity arising under the patent-right, the copyright and the trade-mark laws.<sup>17</sup>
- (3) All matters and proceedings in bankruptcy.<sup>18</sup>

§ 7. (F) **Civil Rights.**—This group is an inheritance from the era of reconstruction, immediately succeeding the war between the states, and includes:

(1) All suits authorized by law to be brought by any person to recover damages on account of any injury to his person or property, or of the deprivation of any of his rights or privileges as a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1980 of the Revised Statutes.<sup>19</sup>

(2) All suits authorized by law to be brought against any person, who having knowledge that any of the wrongs mentioned in Section 1980 of the Revised Statutes are about to be done, and having power to prevent or aid in preventing the same, neglects or refuses to do so, to recover damages for any such wrongful act.<sup>20</sup>

(3) All suits at law or in equity to redress the deprivation—under color of any law, statute, ordinance, regulation, custom or usage of any state—of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.<sup>21</sup>

(4) All suits to recover possession of any office—except that of elector of president or vice-president, representative in or delegate to Congress, or member of a state legislature,

<sup>16</sup> J. C. § 24, cl. 6.

<sup>17</sup> J. C. § 24, cl. 7.

<sup>18</sup> J. C. § 24, cl. 19.

<sup>19</sup> J. C. § 24, cl. 12.

<sup>20</sup> J. C. § 24, cl. 13.

<sup>21</sup> J. C. § 24, cl. 14.

and authorized by law to be brought, wherein it appears that the sole question touching the title to said office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color or previous conditions of servitude; such jurisdiction extending no further than the effect of the denial of the right to vote secured by law.<sup>22</sup>

(5) All suits brought by any person to recover damages for any injury to his person or property on account of any act, done by him, under any law of the United States—to enforce the right of citizens of the United States to vote in the several states.<sup>23</sup>

§ 8. (G) **Admiralty, Prize and Seizures.**—Under this head come :

(1) All civil causes of admiralty and maritime jurisdiction (saving to suitors the right of common-law remedy where the common law is competent to give it).<sup>24</sup>

(2) All prizes brought into the United States and proceedings for the condemnation of property taken as prize.<sup>25</sup>

(3) All seizures on land and water not within admiralty and maritime jurisdiction.<sup>26</sup>

§ 9. (H) **Miscellaneous Instances.**—Here belong all suits against consuls and vice-consuls;<sup>27</sup> all suits by an alien, for a tort only, in violation of the law of nations or of a treaty of the United States;<sup>28</sup> proceedings involving the right of any person of Indian descent to any allotment of land under law or treaty;<sup>29</sup> and suits between citizens of the same state, claiming land under grants from different states.<sup>30</sup> In all the foregoing cases, from (A) to (H) inclusive, the federal juris-

<sup>22</sup> J. C. § 24, cl. 15.

<sup>23</sup> J. C. § 24, cl. 11.

<sup>24</sup> J. C. § 24, cl. 3.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> J. C. § 24, cl. 18.

<sup>28</sup> J. C. § 24, cl. 17.

<sup>29</sup> J. C. § 24, cl. 24.

<sup>30</sup> J. C. § 24, cl. 1.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

diction exists, no matter how small the amount in controversy may be.

§ 10. **Assignment — Exceptions to Limitation.** — The *second* class of cases belonging to the original jurisdiction, viz.: Where the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and (a) arises under the constitution, laws or treaties of the United States, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects, embraces the great bulk of the ordinary litigation originally brought in the District Courts.

In order to preserve the rightful jurisdiction of the state courts,<sup>31</sup> subdivisions (b) and (c) in this class are expressly limited by statute, so that no assignee or subsequent holder of any promissory note or other *chose in action* can maintain an action to recover thereon in the federal courts, unless such action could have been maintained had no assignment whatsoever taken place.<sup>32</sup>

The limitation, however, expressly excepts from its operation foreign bills of exchange and instruments payable to bearer executed by a corporation. The policy of the limitation is to prevent assignments for the purpose of founding federal jurisdiction; and the limitation is an example of the withholding by Congress, from the inferior federal courts, of a jurisdiction within the grant of judicial power contained in the constitution. A foreign bill of exchange is a bill drawn down by a person in one country on a person in another. The states are foreign to each other under this rule.<sup>33</sup>

The exception as to foreign bills of exchange goes back to the first judiciary act; and it was evidently considered that such bills so usually involved international or interstate relations as to justify their justiciation in the federal courts.

<sup>31</sup> *Bushnell v. Kennedy*, 9 Wall. 387.

<sup>32</sup> J. C. § 24, cl. 1.

<sup>33</sup> *Buckner v. Finley*, 2 Pet. 586; *Dickins v. Beal*, 10 Pet. 572; *Bank v. Daniel*, 12 Pet. 32; *Knickerbocker Ins. Co. v. Pendleton*, 112 U. S. 696.

The exception as to instruments payable to bearer and executed by a corporation applies to municipal as well as private corporations;<sup>34</sup> and was intended to permit the federal courts to take jurisdiction of the vast army of controversies such as arise, for example, out of corporate bonds and mortgages and similar securities.

§ 11. **Assignment—Chose in Action.**—The older statutes, which have been merged into the judicial code, use the words “any suit to recover the *contents* of any promissory note, etc.,” in the limitation of suits by assignees. By the term *contents* was meant the summation of legal or equitable rights (any or all of them) enforceable by action, vested by contract in a party.<sup>35</sup>

The Judicial Code says, “Any suits to *recover upon* any promissory note, etc.,” which connotes the same thing in plainer language.<sup>35a</sup> The term “chose in action,” as contained in the limitation, “is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises, which confer on one party a right to recover a personal chattel or a sum of money from another by action.”<sup>36</sup>

This sweeping language must, however, be qualified. The phrase, “*a right* to recover a personal chattel,” was not intended to apply to cases where the *title* to the chattel itself has passed to the plaintiff, and he seeks a recovery thereof in specie, or damages for a tortious injury to the same, as to his property; but rather to cases where a remedy is asserted upon the contractual relation (the *obligation*) existing between the former parties, whether that relation imposed a duty to pay money or to deliver a personal chattel.<sup>37</sup>

The term “chose in action” includes all debts and claims for damages for breach of *contract* or for torts connected with

<sup>34</sup> *Loeb v. Township*, 179 U. S. 472; *Independent School Dist. v. Hall*, 113 U. S. 135; *New Providence v. Halsey*, 117 U. S. 336.

<sup>35</sup> *Shoecraft v. Bloxham*, 124 U. S. 730; *Corbin v. Black Hawk County*, 105 U. S. 659.

<sup>35a</sup> *Brown v. Fletcher*, 235 U. S. 589.

<sup>36</sup> *Sheldon v. Sill*, 8 How. 441.

<sup>37</sup> *Deschler v. Dodge*, 16 How. 622.



*contract*. It does not include a right of action founded upon a mere tort, but applies to rights of action founded upon *contracts* that in themselves could be said to *contain* some promise or duty to be performed.<sup>38</sup> Hence, a right to recover damages for trespass and cutting timber is not a chose in action within the limitation.<sup>39</sup> On the other hand, a suit to foreclose a mortgage by the assignee of the debt;<sup>40</sup> a suit for the specific performance of a contract;<sup>41</sup> a suit by the assignee of a judgment founded on a contract;<sup>42</sup> an action by the assignee upon certificates issued by the police board of a city;<sup>43</sup> and an action by the assignee of a claim for damages for breach of contract,<sup>44</sup> are all within the statutory inhibition.

It must be especially observed that the prohibition is directed not against an original, but a derivative cause of action. Hence an indorsee may sue his *immediate* indorser, regardless of the citizenship of maker or prior indorsers, upon the special contract between them arising from the indorsement.<sup>45</sup>

So the acceptance of a draft creates a new contract between payee and acceptor and the citizenship of the drawer is immaterial.<sup>46</sup>

§ 12. **Who Are Assigns—Pleading and Proof.**—The term *assignee* has been held to include not merely one to whom the contract is technically assigned, but also those who, by virtue of *any* transfer, can propound and assert a beneficial

<sup>38</sup> *Bushnell v. Kennedy*, 9 Wall. 387.

<sup>39</sup> *Ambler v. Eppinger*, 137 U. S. 480.

<sup>40</sup> *Sheldon v. Sill*, 8 How. 44; *Blacklock v. Small*, 127 U. S. 96; *Kolze v. Hoadley*, 200 U. S. 76.

<sup>41</sup> *Corbin v. Black Hawk County*, 105 U. S. 659.

<sup>42</sup> *Walker v. Powers*, 104 U. S. 245; *Mississippi Mills v. Cohn*, 150 U. S. 202.

<sup>43</sup> *New Orleans v. Benjamin*, 153 U. S. 411.

<sup>44</sup> *North American, etc., Co. v. Morrison*, 178 U. S. 262.

<sup>45</sup> *Young v. Bryan*, 6 Wheat. 146; *Coffee v. Planters' Bank*, 13 How. 183; *Parker v. Ornsby*, 141 U. S. 81.

<sup>46</sup> *Superior v. Ripley*, 138 U. S. 93.

interest in the contract.<sup>47</sup> “The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments *by operation of law, creating legal representatives*, are not within the mischief or reason of the law.”<sup>48</sup> A person entitled in equity to be subrogated to the rights of another is not an assignee;<sup>49</sup> and it would seem that a guardian vested by the law with the property and choses in action of his ward would stand on the same footing.<sup>50</sup>

Certainly, an executor or administrator is not an assignee.<sup>51</sup>

It has been held, however, that general assignees in insolvency proceedings,<sup>52</sup> and purchasers at a judicial sale,<sup>53</sup> are within the limitation; and these cases even assert that the term “assignee” is broad enough to include assignments by operation of law as well as by act of the parties, which seems to me a plainly erroneous suggestion. Whether or not the suit could have been brought in the federal court if there had never been any assignment, is to be determined as of the date when the suit is brought.<sup>54</sup> It should be especially observed that the plaintiff assignee must plead and prove the capacity of the first and original assignor (as of the time just aforesaid); and unless this be done, the suit will be dismissed.<sup>55</sup>

**§ 13. Suits Arising Under Constitution, Etc.—Opening Pleading Must Show.**—The language of the statute, relating to the second jurisdictional class, is “all suits of a civil nature, at common law or in equity—where the matter in controversy

<sup>47</sup> *Plant Investment Co. v. Railway Co.*, 152 U. S. 71.

<sup>48</sup> *New Orleans v. Gaines' Admr.*, 138 U. S. 595.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Mexican Central Ry. Co. v. Eckman*, 187 U. S. 1. c. 434.

<sup>51</sup> *Childress v. Emory*, 8 Wheat. 642; *Chappedelaine v. Dechenaux*, 4 Cranch. 307; *Holmes v. Goldsmith*, 147 U. S. 1. c. 161; Cf. *Brown v. Fletcher*, 235 U. S. 589.

<sup>52</sup> *Sere v. Pitot*, 6 Cranch. 332.

<sup>53</sup> *Glass v. Concordia Parish*, 176 U. S. 207.

<sup>54</sup> *Emsheimer v. New Orleans*, 186 U. S. 33.

<sup>55</sup> *Kolze v. Hoadley*, 200 U. S. 76.

§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and (a) arises under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects.” I invite your attention to the first of these subordinate cases.<sup>56</sup> It will be observed that this clause of the statute—“arises under the constitution, etc.”—is substantially identical with the first clause of Section 2 of Article 3 of the Constitution.

In interpreting the *constitutional* grant, it has been laid down by great authority that, in order to constitute a *case* or *controversy* arising under the constitution, laws or treaties of the United States, it is not necessary that the *plaintiff* immediately, in his petition or opening complaint, demand something conferred upon him by the constitution or a federal law or treaty. A case or controversy in law or equity ordinarily involves adversary parties, and consists of the right of one party as well as the other. The case or controversy is made up equally and essentially of both these adverse rights, and if either of them arise under the constitution, law or treaty, then the case or controversy must so arise.<sup>57</sup>

If we assume that Clause 1 of Section 2 of Article 3 furnishes the sole authority to vest the courts with jurisdiction over such *federal* questions, it is difficult to escape this reasoning. It is reinforced by the fact that if the plaintiff's contentions alone are to be taken into account, no case could ever be re-examined by the United States Supreme Court, where the *defendant* in the state court was deprived of his federal contentions; unless, at least, we should regard such a writ of error as an entirely new case.

Nevertheless, the rule as to the *statute* conferring original jurisdiction is firmly settled, that a case or controversy “does

<sup>56</sup> J. C., § 24, cl. 1.

<sup>57</sup> *Cohens v. Virginia*, 6 Wheat. 1. c. 379; *Nashville v. Cooper*, 6 Wall. 247.

not arise under the constitution or laws of the United States unless it appears from the plaintiff's own statement, *in the outset*, that some right, title, privilege or immunity on which recovery depends will be defeated by one construction of the constitution or laws of the United States or sustained by the opposite construction." The same is of course applicable to rights arising under treaty.<sup>58</sup>

The reason upon which this rule may be supported seems to me to be as follows: ~~Nothing~~ is better settled than that the courts of the United States are courts of limited jurisdiction. In every case (in the absence at least of collateral attack upon a judgment) the presumption at every stage is against the existence of federal jurisdiction, unless it plainly appears. ~~When~~, therefore, a petition is filed which discloses no ground of federal justiciability, every step taken under that petition is presumptively void. It is true that an answer or pleading may be subsequently filed, which will inject into the case a federal claim; and it is further true, that under such circumstances, the jurisdiction then attaching might be held to relate back so as to qualify the case *ab initio*. No intelligent defendant would be apt, however, if well advised, to cure the lack of jurisdiction in his opponent's case. In the meantime, the question of jurisdiction or no jurisdiction, for the purposes and future of *that* case, would remain, so to speak, in expectancy, or rather, in mere possibility, and every order might be at any time nullified. Such a condition, as a practical matter, would be most intolerable. No court could or ought to put itself in such a situation. Jurisdiction for the administration of justice and the respect of courts, must plainly and demonstrably exist or not exist, from the very beginning of judicial action; and the federal courts have been driven, as a matter of necessary judicial policy, to lay down the general rule as stated, applicable to every such invocation of their original jurisdiction.

In other words, as a prerequisite to jurisdiction upon the

<sup>58</sup> Bankers' Mutual, etc., Co. v. Minneapolis, etc., Co., 192 U. S. 371; Tenn. v. Union & Planters Bank, 152 U. S. 454.

§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ground of the involution of a federal question, the federal question must *appear* in the case; until it does appear, there is no jurisdiction; and because of the practical difficulties suggested, it must appear in the beginning and not elsewhere. It makes no difference in the application of this rule, that an answer or replication is filed, or evidence subsequently adduced which then manifests the involution of a federal question; or that the plaintiff, by way of anticipation, sets up that his opponent will rely upon a federal defense, for his opponent may, at his option, do nothing of the kind.<sup>59</sup>

Under this view, there is no inconsistency between the interpretation of constitution and of statute. The standpoint from which to look for a federal question is *at the outset*; but this means at the time the jurisdiction of the *federal* court is invoked.<sup>60</sup>

§ 14. **Cases Under Constitution, Laws or Treaties—Real Involution—Dismissal.**—A case or controversy has been said to arise under the constitution, laws or treaties of the United States, whenever its correct decision depends upon the construction of either.<sup>61</sup>

It is essential to the jurisdiction, that it appears that some title, right, privilege or immunity, *on which the recovery depends*, will be defeated by one construction of constitution, law or treaty, and sustained by the opposite construction.<sup>62</sup> When we say, “on which the recovery depends,” we must remember, from the standpoint of the original jurisdiction, we are looking at the petition or complaint before any evi-

<sup>59</sup> *Boston, etc., Copper Co. v. Montana Ore Co.*, 188 U. S. 632; *Devine v. Los Angeles*, 202 U. S. 313; *Arkansas v. Kansas, Etc., Coal Co.*, 183 U. S. 186.

<sup>60</sup> *Cf. Tennessee v. Davis*, 100 U. S. 257; *Metcalf v. Watertown*, 128 U. S. 586.

<sup>61</sup> *Cohens v. Virginia*, 6 Wheat. 1. c. 379; *Tennessee v. Davis*, 100 U. S. 257.

<sup>62</sup> *Osborn v. Bank*, 9 Wheat. 1. c. 822; *Starin v. New York*, 115 U. S. 248; *Bankers' Mutual, etc., Co. v. Minneapolis, etc., Co.*, 192 U. S. 1. c. 385.

dence has been taken or other pleadings filed. A case is usually made up of a number of contentions, some of federal and some of non-federal character. The case may be, in the sequel (and frequently *is*), determined in the federal courts upon questions of non-federal character. In such case the recovery does not strictly *depend* upon the federal right or immunity set up or claimed.<sup>63</sup> What is meant is, that the recovery, in whole or in part, *at the outset* apparently depends upon the right or immunity set up—that such right or immunity, if affirmed or denied, would be decisive of some issue in the case—must be *directly* involved under the facts stated.

Whenever, in any case, a right or immunity is *substantially* asserted, of such a character as to require the court in passing upon its validity, to construe the constitution, law or treaties of the United States, that case may be said, in a general sense, to arise under such constitution, laws or treaties. With respect to the laws of the United States, the following statement has met with repeated judicial approval: “Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection or defense of the party, *in whole or in part*, by whom they are asserted.”<sup>64</sup>

The claim of a federal right or immunity, for the purpose of founding federal jurisdiction, should not be merely fanciful, or immaterial or made for the purpose of conferring a colorable right to adjudicate the suit. To give effect to unsupported or fraudulent allegations of this sort would not only rob the state courts, but nullify the *limited* character of federal jurisdiction. It must appear by a statement of facts upon the record, in legal and logical form, such as good pleading requires, that the suit does *really and substantially* involve a dispute or controversy as to a right depending upon the construction of the constitution or some law or

<sup>63</sup> Cf. *Siler v. L. & N. R. R. Co.*, 213 U. S. 175.

<sup>64</sup> *Ex parte Lennon*, 166 U. S. l. c. 554, and cases cited.

treaty of the United States, before jurisdiction on this ground can be sustained.<sup>65</sup>

Even though the petition or opening pleading show federal jurisdiction, it is still the duty of the Court, if it discovers later, that there is no *real and substantial federal question*, to dismiss the case. Accordingly, it is provided by Section 37 of the Judicial Code as follows: "If in any suit commenced in a District Court or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, *at any time* after such suit has been brought or removed thereto, that such suit *does not really and substantially involve a dispute or controversy properly within the jurisdiction of* said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendant, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to the costs as shall be just."<sup>66</sup>

The statutory duty thereby imposed is equally applicable to diversity of citizenship,<sup>67</sup> and to the involution of the requisite amount in controversy.<sup>68</sup> Of course, consent of parties can never confer jurisdiction over subject matter.<sup>69</sup> We shall hereafter return to what constitutes a *real federal question*, in discussing appellate jurisdiction.

<sup>65</sup> Robinson v. Anderson, 121 U. S. 522; Shreveport v. Cole, 129 U. S. 36; City of New Orleans v. Benjamin, 152 U. S. 411; McCain v. Des Moines, 174 U. S. 168; Defiance Water Co. v. Defiance, 191 U. S. 184.

<sup>66</sup> Minnesota v. Northern Securities Co., 194 U. S. l. c. 65; Excelsior, etc., Pipe Co. v. Pacific, etc., Co., 185 U. S. l. c. 287; Robinson v. Anderson, 121 U. S. 522.

<sup>67</sup> Williams v. Nottawa, 104 U. S. 209; Hartog v. Memory, 116 U. S. 588; Morris v. Gilmer, 129 U. S. 315; Deputron v. Young, 134 U. S. 241.

<sup>68</sup> Barry v. Edmunds, 116 U. S. 550; Wetmore v. Rymer, 169 U. S. 115; Put-in-Bay Waterworks v. Ryan, 181 U. S. 409.

<sup>69</sup> Minnesota v. Northern Securities Co., 194 U. S. l. c. 62.

§ 15. **Federal Corporations—Federal Officers.**—There is one peculiar group of cases, which are held to arise under the laws of the United States, to which I must direct your attention. While there is no specific statute justifying it, the federal courts are held to have jurisdiction of actions by and against all corporations created by the United States, upon the ground that such actions arise under federal laws. Thus it was held in the case of *Osborn v. the Bank of the United States*,<sup>70</sup> that the right of the bank to maintain an action at all, as a legal entity, involved the construction of its charter, which was a law of the United States; and that there was likewise involved in the assertion of any right whatsoever by a federal corporation, the fundamental question as to whether, under its charter, such right could be lawfully acquired or exercised; and so the case necessarily would arise under the laws of the United States. The same doctrine was repeated and approved in the *Pacific Railroad Removal Cases*,<sup>71</sup> and would still seem to be the law of the court, except so far as changed, expressly or impliedly, by statute.<sup>72</sup>

National banks are placed by statute upon the same basis, for general purposes, as ordinary non-federal corporations of the states wherein they are located,<sup>73</sup> but they would still seem to be protected against attachment, execution and preliminary injunction in the state courts before final judgment.<sup>74</sup>

By a recent statute, the jurisdiction over railways, upon the ground of federal incorporation, has been abrogated.<sup>75</sup>

But in the case of a mere federal agent (as distinguished from a federal creature) like a railroad corporation employed to carry the mail or a railway mail clerk in the service of

<sup>70</sup> 9 Wheat. 1. c. 823.

<sup>71</sup> 115 U. S. 1.

<sup>72</sup> Cf. *Tex. & Pac. R. R. Co. v. Cody*, 166 U. S. 606; *In re Dunn*, 212 U. S. 374; *Shulthis v. McDougal*, 225 U. S. 561.

<sup>73</sup> 22 Stat. 163; Act of July 12, 1882; J. C. § 24, cl. 16; *Herrman v. Edwards*, 238 U. S. 107.

<sup>74</sup> R. S. 5242.

<sup>75</sup> Act of Jan. 28, 1915, 38 Stat. 803; *Bankers' Trust Co. v. Tex. & Pac. Ry. Co.*, 241 U. S. 295.



the government, such employment would import in itself no right under the constitution or laws of the United States so as to confer jurisdiction upon the federal courts. Thus neither a suit against a railway company, engaged under the federal laws and postal regulations in transporting the mails, to recover damages for the negligent loss of a registered package, nor an action by a railway mail clerk for negligent injury by the railway company transporting him, are suits arising under the constitution or laws of the United States, where they do not turn in whole or in part on a controversy between the parties in regard to the operation of the constitution or laws on the facts.<sup>76</sup>

A receiver appointed by a federal court in the exercise of its general equity powers, and not under any specific provisions of the constitution or laws of the United States, cannot insist that actions against him are therefore cases arising under such constitution or laws, where his liability depends upon the general law.<sup>77</sup> Where, however, the federal receiver is appointed over a federal corporation, the rule is otherwise.<sup>78</sup>

Where a suit is brought against a federal officer, *as such*, the defendant is a federal creature, deriving his powers and duties from the laws of the United States. Such a suit is therefore one arising under the laws of the United States.<sup>79</sup> Where, however, the suit is brought against a marshal, as a mere individual trespasser, with no reference to his official position or functions, I can see no reason why the case should

<sup>76</sup> Bankers' Mutual, etc., Co. v. Minneapolis, etc., Co., 192 U. S. 371; Price v. Pennsylvania, etc., Co., 113 U. S. 218.

<sup>77</sup> Gableman v. Peoria Ry. Co., 179 U. S. 335; Bausman v. Dixon, 173 U. S. 113; Pope v. Louisville, etc., Ry. Co., 173 U. S. 573.

<sup>78</sup> Texas & Pac. R. R. Co. v. Cox, 145 U. S. 593; Gableman v. Peoria Ry. Co., 179 U. S. 335; Pope v. Louisville, Etc., Ry. Co., 173 U. S. l. c. 580.

<sup>79</sup> Feibelman v. Packard, 109 U. S. 421; Backrath v. Norton, 132 U. S. 337; Bock v. Perkins, 139 U. S. 628; Sonnentheil v. Brewing Co., 172 U. S. 401; Howard v. U. S. 184 U. S. 676.

be said to *arise* under the laws of the United States, within the meaning of the statute.<sup>80</sup>

§ 16. **Diverse Citizenship—What Constitutes.**—Turning now to the subordinate group, where the jurisdiction is based upon the fact that the controversy “*is between citizens of different states,*” we have already noted the limitation imposed by Congress with respect to the capacity of assignees or subsequent holders of promissory notes or other *choses in action*.

The word “between” in this statute imports *opposition, diversity*, which must exist between the parties who support one side of the controversy *and* those who support the other. This opposition or diversity is with respect to citizenship of a state. The historic case dealing with the question of citizenship of a state is the celebrated one of *Scott v. Sandford*.<sup>81</sup>

The questions discussed in that case have been settled by the fourteenth amendment to the federal constitution, which declares that “all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States *and of the states wherein they reside.*”

A person may plainly be a citizen of the United States, without being a citizen of any state; for he may be born in the United States and reside in a territory, or not reside in any state at all.<sup>82</sup>

So a person may be, for most state purposes, a citizen of a state, without being a citizen of the United States; an alien born, and never naturalized, may make his home in, and be permitted to vote and hold office under, a state; but such a state citizenship is not recognized as founding the diversity of citizenship requisite for the jurisdiction of the federal courts.<sup>83</sup> Nothing is better settled than that a citizen of the

<sup>80</sup> *Walker v. Collins*, 167 U. S. 57; *People's Bank v. Goodwin*, 160 Fed. 727.

<sup>81</sup> 19 How. 393.

<sup>82</sup> *Slaughter House Cases*, 16 Wall. 36; *Prentiss v. Brennan*, 2 Blatchf. 162.

<sup>83</sup> *Scott v. Sandford*, 19 How. 393, 404; *City of Minneapolis v. Reum*, 56 Fed. 576.

United States residing in a territory or the District of Columbia cannot sustain as plaintiff or defendant an action based upon diversity of citizenship in the federal courts.<sup>84</sup>

In spite of the provisions of the fourteenth amendment, residence in, and citizenship of, a state are not regarded as *prima facie* synonymous, so as to found federal jurisdiction. This rule was established prior to the adoption of the amendment, and has since been persisted in, upon the ground that residence within a state does not import citizenship of the United States, and may be temporary, whereas the residence spoken of in the amendment is used in the sense of permanent residence or domicile. The presumption being against the limited jurisdiction, the mere allegation that a person is a resident of a particular state, is insufficient to show the existence of jurisdiction.<sup>85</sup> Cases sometimes arise where federal citizenship exists by reason of birth, but original state citizenship has been lost by abandonment of state domicile, so that no federal jurisdiction would seem to exist.<sup>86</sup>

§ 17. **Diverse Citizens—Corporate Bodies.**—Taking up the citizenship of bodies politic and corporate, it is manifest that the state itself is not a citizen of a state within the meaning of the rule.<sup>87</sup> A political subdivision of a state, like a county,<sup>88</sup> or a municipal corporation,<sup>88a</sup> expressly or impliedly authorized to contract liabilities and to sue or be sued with respect thereto, is to be deemed a citizen of the state by which it is created, and may sue and be sued as such in the courts of the United States.

<sup>84</sup> Hooe v. Jamison, 166 U. S. 395; Hepburn v. Elzey, 2 Cranch. 445; Barney v. Baltimore, 6 Wall. 280; New Orleans v. Winter, 1 Wheat. 91; Southern Ry. Co. v. Briscoe, 144 U. S. 133.

<sup>85</sup> Robertson v. Cease, 97 U. S. 646; Everhart v. Huntsville College, 120 U. S. 223; Steigleder v. McQuestin, 198 U. S. 141; Marks v. Marks, 75 Fed. 321; Prentiss v. Brennan, 2 Blatchf. 162.

<sup>86</sup> Hammerstein v. Lyne, 200 Fed. 165.

<sup>87</sup> Postal Tel. Cable Co. v. Alabama, 155 U. S. 482.

<sup>88</sup> Cowles v. Mercer County, 7 Wall. 118; Lincoln County v. Luning, 133 U. S. 529.

<sup>88a</sup> Loeb v. Columbia Township, 179 U. S. 472.

With respect to corporations aggregate in general, it was long the rule in the federal courts that they were not citizens in the sense of the constitution, and that their rights to sue or be sued on the ground of diversity of citizenship depended upon averment and proof of citizenship of the individual members or shareholders.<sup>89</sup> Such a rule, if persisted in, would have closed the doors to practically all corporate litigation involving interests of any moment, where no federal question was concerned; and the trend toward the multiplication of corporations was then beginning to manifest itself. It was abandoned by the unanimous decision of the Supreme Court in 1844, after arguments of great learning and ability; and it has ever since been settled doctrine that a corporation is an artificial person in itself, and must be conclusively presumed to be composed of citizens of the state of incorporation; and that the federal courts will not look beyond the artificial entity to enquire into its actual membership.<sup>90</sup>

This presumption attends the corporation when it does business through its corporate agents in states other than that of its original incorporation; and it cannot change its residence or citizenship, and its domicile can only be within the state of its creation.<sup>91</sup> The somewhat technical reason is that the laws of that state enter into, indeed constitute, the organic structure of the corporation; and such laws can have no operation, of their own force, outside of that state. Hence an averment of incorporation under the laws of a particular state is sufficient to confer jurisdiction in an action by a citizen of another state.<sup>92</sup> It makes no difference in this rule

<sup>89</sup> U. S. Bank v. DeVeaux, 5 Cranch. 61; Hope Insurance Co. v. Boardman, 5 Cranch. 57; Commercial Bank v. Slocomb, 14 Pet. 60.

<sup>90</sup> Louisville, etc., Ry. Co. v. Letson, 2 How. 497; Marshall v. Baltimore, etc., R. R. Co., 16 How. 314; Muller v. Dows, 94 U. S. 444; Shaw v. Quincy Mining Co., 145 U. S. 444; St. Louis, etc., R. R. Co. v. James, 161 U. S. 545.

<sup>91</sup> St. Louis, etc., R. R. Co. v. James, 161 U. S. 545; Baltimore, etc., R. R. Co. v. Koontz, 104 U. S. 5; *Ex parte Schollenberger*, 96 U. S. 369.

<sup>92</sup> Ohio, etc., R. R. Co. v. Wheeler, 1 Black. 286; Marshall v. Baltimore, etc., R. R. Co., 16 How. 314.

that the corporation be expressly licensed, or tacitly suffered, to do business or maintain offices in another state by the laws thereof.

§ 18. **Diverse Citizens—Consolidated or Domesticated Corporations.**—Questions of a more troublesome character arise in such situations as where a corporation originally created by one state is domesticated in another in pursuance of the laws thereof; or where the same persons have been erected into a corporation, with the same name, powers and franchises, by the legislatures of several states; or where corporations of various states are consolidated under laws passed by each of the creative states. Railway, bridge and power or irrigation companies of this character are not infrequent. For example, the X & Y Railway Company may be chartered by State X with power to build, own and operate a line of railways through states X and Y. At the same time and as a part of the same scheme, State Y charts the X & Y Railway Company with the same powers, and the same organization. The railway is built and operated as a continuous and integral line between the two states under common management.

Such a company might be regarded as a corporation of the first state granting the charter, or as a corporation jointly created by both states, or as separate corporations of each state. The second alternative is impossible. Joint legislative action by two sovereigns is unthinkable save by treaty. For the purposes of federal jurisdiction, it is beyond the alchemy of a state legislature to draw outside the boundaries of the creative state the legal essence of a foreign corporation and compound it with new quality by laws that are powerless beyond their jurisdictional limits. The most that can be done is to *recognize the old or create a new*; and whether in the particular instance, there be one or the other, is in legal effect, a question of identity. It is settled that mere domesticating statutes, declaring, for example, that a foreign corporation, upon filing a copy of its charter and by-laws with the secretary of state shall be and become in all

respects a domestic corporation, cannot avail to change the rule in the federal courts that the citizenship of the identical corporation remains in the state of its original creation.<sup>93</sup>

“Whatever may be the effect of such legislation in subjecting foreign railroad corporations to control and regulation by the local laws of Arkansas, we cannot concede that it availed to *create* an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution so as to subject it as such to a suit by a citizen of the state of its origin.

“In order to bring such an artificial body as a corporation within the spirit and letter of the constitution, as construed by the decisions of this court, it would be necessary to *create* it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Arkansas, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation.”<sup>94</sup>

If this test is to be accepted as conclusive, it is contrary to a notion still entertained, which seems to recognize the right, for purposes of *property* within the jurisdiction, to *create* a domestic out of a pre-existing foreign corporation as such.<sup>95</sup> I am by no means sure that the test as to actual reincorporation out of natural persons will solve all difficulties; and it is manifest that the court has been, to some extent, floundering and searching for a safe and logical rule. What it might do with a case where a corporation, originally chartered in one state, was erected as such into a corporation of the second state, and thereafter surrendered its charter in the first state in statutory form, may remain a subject of conjecture; as well

<sup>93</sup> Southern R. R. Co. v. Allison, 190 U. S. 326.

<sup>94</sup> St. Louis, etc., R. R. Co. v. James, 161 U. S. 545.

<sup>95</sup> B. & O. R. R. Co. v. Harris, 12 Wall. 65; Gerling v. B. & O. R. R. Co., 151 U. S. 1. c. 677; Pennsylvania R. R. Co. v. St. Louis, etc., R. R. Co., 118 U. S. 1. c. 296; Goodlett v. L. & N. R. R. Co., 122 U. S. 1. c. 401.

as their probable action if a state should attempt to organize *the president and directors* (by such official designation only) of a named corporation. In any event it is a brave presumption (legislative rather than judicial in quality) that all the shareholders of a corporation, formed by consolidation of several foreign and domestic corporations, are at the same time natural citizens of each of the states in which the consolidation was effected.

The compulsoriness of foreign domestication, in order to do business, is suggested in recent cases as one basis for denying its effect as a change of jurisdictional identity. This reaches back to the necessity of the acceptance of a charter, in order to form a corporation, and injects the element of intention. To some extent this would seem to confess that the question is one of fact.<sup>96</sup>

§ 19. **The Same.** (Cont.)—In the event State X had originally chartered the X Railway Company, and State Y the Y Railroad Company, and each state had subsequently passed laws authorizing the consolidation of these companies into the X & Y Railways Company and providing that the consolidated company should own, enjoy and exercise all powers, franchises, rights and property belonging to either of said companies, and such consolidation was thereafter actually consummated by proper corporate action, then on general principles of corporation law, there would result the extinction of companies X and Y and the creation of a new corporation; or both companies X and Y would in contemplation of law enjoy uninterrupted corporate existence, but under the new name, and perhaps with wider powers and somewhat different organization. No matter which was true, for the purposes of federal jurisdiction there would still be two separate and distinct corporations; one, the X & Y Railway Company, created under the authority of the laws of State X and indisputably a citizen of State X; and the other, the X & Y Railway Company, created under the authority of the

<sup>96</sup> *Missouri Pac. Co. v. Castle*, 224 U. S. 541; *Patch v. Wabash R. R. Co.*, 207 U. S. 277..

laws of State Y and conclusively presumed to be a citizen of that state.

At this point a peculiar difficulty manifests itself. While a corporation cannot migrate from the state of its creation, it can, and nearly always does, transact much of its business in other states. The consolidated X & Y Company operates an integral line, under common management, through the two states. Are we to say (1) that the corporation of that name created by the laws of X is to be regarded as doing business jointly with the home corporation in the State of Y, and vice versa? Or (2) are we to say that all legal relationships arising in State X shall be conclusively imputed to the corporation created by that state, and similarly those arising in State Y to the corporation erected there?

Or (3) shall we say that with respect to duties owed to and by it the corporation is a unit, but where suit is brought by or against it for breach of duty or enforcement of liability, no matter where arising, its jurisdictional aspect will always be that of a citizen of that particular state in which the instant suit is pending?

Fundamentally, it seems to me that the answer to these questions involves much more the determination of substantive than of procedural law. The problem is to determine to whom or by whom the duty is owed or owing. The plaintiff's petition will usually show, in cases arising under the original jurisdiction, that the defendant (or plaintiff) is incorporated under the laws of a particular state. The question will arise whether this averment is true, and whether the claim or liability asserted is in law and fact a claim or liability justly asserted by or against the particular corporation.<sup>97</sup>

It is certain that the X & Y Railroad Company could not be sued, as a corporation organized under the laws of X *and* Y by a citizen of X or Y, for the very good reason that no diversity of citizenship could be presumed.<sup>97a</sup> It is equally

<sup>97</sup> Cf. *St. Louis, etc., R. R. Co. v. James* (dissenting opinion), 161 U. S. 554.

<sup>97a</sup> *Ohio, Etc., R. R. Co. v. Wheeler*, 1 Black 286; *St. Joseph, Etc., R. R. Co. v. Steele*, 167 U. S. 659.



§ 20 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

certain that where an injury occurs in State X, the person injured has a clear right to bring a suit and recover in X against X & Y Railway Company as a corporation organized and existing under the laws of the State of X.<sup>98</sup>

§ 20. **The Same.** (Cont.)—In *Nashua, Etc., R. Co. v. B. & L. R. Co.*, the plaintiff sued as a citizen of New Hampshire in the United States Circuit Court for Massachusetts. The plaintiff company has been originally chartered in New Hampshire, a company of the same name had been chartered by Massachusetts, and then the two companies had been merged and consolidated by acts of Massachusetts and New Hampshire. The jurisdiction was sustained, three of the justices dissenting; so that if this case is to stand, the jurisdictional aspect of the plaintiff was not conclusively that of a citizen of Massachusetts, although the suit was pending in that state. The lower federal courts have undertaken to assimilate this case with those of the James type; but I cannot so read the case.<sup>99</sup> The overwhelming tendency in these courts is in the direction of the third alternative.<sup>100</sup>

In the *Fitzgerald* case<sup>101</sup> the corporation is said to be “a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each. It dwells in three states and is a single and separate entity in each.”

While some comfort may be gleaned by the advocates of the second alternative,<sup>102</sup> the third alternative ought to be

<sup>98</sup> *Patch v. Wabash R. R. Co.*, 207 U. S. 277; *Chicago, etc., R. R. Co. v. Whitton*, 13 Wall. 270.

<sup>99</sup> 136 U. S. 356.

<sup>100</sup> *Fitzgerald v. Mo. Pac. R. R. Co.*, 45 Fed. 812; *Central Trust Co. v. St. Louis, etc., R. R. Co.*, 41 Fed. l. c. 552; *Paul v. B. & O. R. R. Co.*, 44 Fed. 513; *Williamson v. Krohn*, 66 Fed. 655; *Baldwin v. Chicago, R. R. Co.*, 86 Fed. 116; *Goodwin v. Boston, etc., R. R. Co.*, 127 Fed. 986; *Lake Shore, etc., R. R. Co. v. Eder*, 174 Fed. 944.

<sup>101</sup> 45 Fed. 812.

<sup>102</sup> Cf. *Mo. Pac. R. R. Co. v. Meeh*, 69 Fed. 753; *Winn v. Wabash R. R. Co.*, 118 Fed. l. c. 65; *Quincy Bridge Co. v. Adams County*, 88 Ill. 615; *Memphis, etc., R. R. Co. v. Alabama*, 107 U. S. 581; *Patch v. Wabash R. R. Co.*, 207 U. S. 277.

regarded as the law.<sup>103</sup> Upon strictly logical grounds, if we are to recognize as a basic fact the necessary separateness and individuality of corporations created by concurrent action of two or more state legislatures, I see no reason, save upon equitable grounds, for insisting upon theoretical unity with respect to rights and obligations. This, however, is a matter intimately bound up with state policy and legislation.

§ 21. **Diverse Citizens — Partnerships — Boards, Etc. — Suit by Stockholder.**—The basis of the original relaxation of the rule as to citizenship, in favor of corporations, was that although artificial, they were distinct legal persons. Manifestly this ground does not apply to partnerships (whether general or limited) or joint stock companies, or boards of trustees. These associations have no juristic citizenship apart from that of their members.<sup>104</sup> Where, however, a stockholder in a corporation brings a suit in good faith for the protection of the corporate rights his actual citizenship is taken into account for the establishment of diversity and the corporation (*under hostile control*) is treated as an adverse party; even though the ultimate interest of the corporation (which must be made defendant in such cases) may eventually be forwarded by the success of his contentions.<sup>105</sup>

§ 22. **Diverse Citizens—Real and Nominal Parties.**—We must further observe that the federal courts have made the citizenship of the parties really and substantially concerned the test of jurisdiction, rather than those who are merely nominal or formal parties to the controversy. The very purpose of vesting federal jurisdiction in this class of cases was to secure impartiality between *conflicting interests*; and the

<sup>103</sup> Cf. *Muller v. Dows*, 94 U. S. 444.

<sup>104</sup> *Chapman v. Barney*, 129 U. S. 677; *Great Southern, Etc., Co. v. Jones*, 177 U. S. 449; *Raphael v. Trask*, 194 U. S. 272; *Thomas v. Board of Trustees*, 195 U. S. 207; Cf. *McLaughlin v. Hallowell*, 228 U. S. 1. c. 290.

<sup>105</sup> *Doctor v. Harrington*, 196 U. S. 579; *Venner v. Great Northern R. C. Co.*, 209 U. S. 24; Cf. *Dodge v. Woolsey*, 18 How. 331.

§ 22 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Court will look to the real actors in the controversy, rather than the masks used in the contestation.<sup>106</sup>

It must be plain that any comprehensive answer as to who is a real actor in a controversy would involve the treatment of substantive rights of action. Any party is a real actor whose legal or equitable rights will be substantially affected by the event of the controversy submitted to the Court for decision.

As illustrating who are considered nominal, rather than real actors, official bonds are frequently required to run to the state or city under which the principal obligor holds his office, and provision is made for suit thereon in the name of the obligee, at the instance and for the use of any person aggrieved. The state or city in such a case is regarded as a mere passive conduit or repository of the right of action of the various persons who from time to time assert official liability. The same principle would apply to bonds made of similar purport made to the sheriff or marshal or other official as obligee.<sup>107</sup>

Where, however, the right and control of the action, legal or equitable, is vested by the principles of law or equity in a particular person, he is not to be regarded as a mere nominal party, because other persons may be eventually entitled to the proceeds of the litigation.<sup>108</sup>

Thus in suits on the bonds of contractors for government work the United States is regarded as a real and not a nominal party, though the bond protects labor and material men.<sup>109</sup> So executors and administrators stand on their own citizenship, for the purpose of federal jurisdiction, regardless of the persons whom they represent.<sup>110</sup>

<sup>106</sup> *McNutt v. Bland*, 2 How. 9; *Brown v. Strode*, 5 Cranch. 303; *Maryland v. Baldwin*, 112 U. S. 490; *New Orleans v. Gaines' Admr.*, 138 U. S. 595; *Howard v. U. S.* 184 U. S. 1. c. 680.

<sup>107</sup> *Ibid.*

<sup>108</sup> Cf. *Knapp v. Troy, Etc., R. R. Co.*, 20 Wall. 117; *Coal Co. v. Blatchford*, 11 Wall. 172.

<sup>110</sup> *McNutt v. Bland*, 2 How. 1. c. 15; *Rice v. Houston*, 13 Wall 66; *New Orleans v. Gaines*, 138 U. S. 595.

<sup>109</sup> *U. S. Fidelity, Etc., Co. v. U. S.*, 204 U. S. 349.

A general guardian vested in the state of the forum with the right of action may sue in the federal courts without regard to the citizenship of his ward.<sup>111</sup> The same principles would apply to trustees (with the requisite interest)<sup>112</sup> and receivers.<sup>113</sup>

**§ 23. Diverse Citizens—Fraudulent Transfers and Removals.**—As we shall hereafter have occasion to notice, the decisions of state and federal courts exercising jurisdiction within the same territory are not always harmonious. It has often happened that a suit has been won or lost because of the fact that it was tried in a state rather than in a federal tribunal. For this very reason, parties sometimes attempt to make mere colorable transfers so that federal jurisdiction may be invoked by plaintiff or defendant upon the ground of diversity of citizenship. Such a subterfuge and fraud upon the jurisdiction will not be tolerated, and upon proofs being made, the cause will be dismissed.<sup>114</sup>

Where, however, a transfer is absolute and bona fide, the transferee of the land, bonds, foreign bill of exchange or other property may bring his action in whatever court he will, regardless of the motive which induced or accompanied the conveyance. So long as the transaction is real and not simulated and the conveyance is not upon mere trust for the benefit of the grantor, the federal court cannot undertake to disregard it, because the motive actuating the transfer may have been censurable, or because the purpose was to create an ownership that might cut off anticipated defenses.<sup>115</sup>

<sup>111</sup> *Mex. Central R. R. Co. v. Eckman*, 187 U. S. 429.

<sup>112</sup> *Dodge v. Tulleys*, 144 U. S. 451.

<sup>113</sup> *New Orleans v. Gaines' Admr.*, 138 U. S. 595.

<sup>114</sup> *Barney v. Baltimore*, 6 Wall. 280; *Little v. Giles*, 118 U. S. 596; *Farmington v. Pillsbury*, 114 U. S. 138; *Crawford v. Neal*, 144 U. S. 585; *Provident Society v. Ford*, 114 U. S. 635; *Dickerman v. Northon Trust Co.*, 176 U. S. 181; *Lake Commissioners v. Dudley*, 173 U. S. 243.

<sup>115</sup> *Dickerman v. Northon Trust Co.*, 176 U. S. 181; *South Dakota v. North Carolina*, 192 U. S. 286; *Lanier v. Nash*, 121 U. S. 404.

§ 23 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Cases sometimes arise where a party has moved to another state with a view of invoking a line of federal decisions in some anticipated controversy. So long as such removal constitutes an actual and bona fide change of domicile, the federal courts will afford to such party the hearing to which his actual diverse citizenship entitles him. They will not undertake the collateral and difficult task of ascertaining the inducing and controlling cause for the accomplished change of citizenship.<sup>116</sup> If, on the other hand, the removal be ostensible and pretended for the purpose of committing a fraud upon the law limiting the federal jurisdiction, the court must decline to adjudicate the case.<sup>117</sup> So jealous of imposition is the Court, that where the officers and stockholders of a corporation organized under the laws of State X, for the purpose of creating federal jurisdiction, form a new corporation under the laws of State Y, and cause to be conveyed by the old to the new corporation, without consideration, the lands whereof the title is in controversy, the federal court will dismiss the case for want of jurisdiction.<sup>118</sup>

<sup>116</sup> *Morris v. Gilmer*, 129 U. S. 315.

<sup>117</sup> *Ibid.* *Jones v. League*, 18 How. 76.

<sup>118</sup> *Lehigh Mining Co. v. Kelly*, 160 U. S. 327; *Southern Realty Co. v. Walker*, 211 U. S. 603; *Miller v. East Side, Etc., Co.*, 211 U. S. 293.

## **CHAPTER IV.**

### **DISTRICT COURTS—SUBJECT MATTER OF JURISDICTION—CONTINUED.**

- § 1. Diversity Between Really Opposite Parties to Be Complete—  
Realignment.
- 2. Initial Diversity Intended—May Appear From Any Part of  
Record—Amendment of Record to Show.
- 3. Original Jurisdiction in District Court When State Is Party—  
Aliens—Aliens and Citizens.
- 4. Ancillary Jurisdiction.
- 5. Ancillary Jurisdiction—Property in Actual or Potential Pos-  
session.
- 6. Remedies to Recover Property.
- 7. Ancillary Jurisdiction—Record and Processes to Enforce  
judgments.
- 8. Classification Illustrative—Ancillary Instances at Law.
- 9. Ancillary Instances in Equity.
- 10. Suits Against Receivers.
- 11. Amount in Controversy—Law and Equity.
- 12. Amount in Controversy—Suits at Law.
- 13. Amount in Controversy—Suits at Law.
- 14. Amount in Controversy—Suits in Equity—Plaintiffs.
- 15. The Same—Illustrations.
- 16. The Same—Illustrations—Creditors' Suits.
- 17. The Same—Defendants.
- 18. The Same—Difficulty of Applying Tests.
- 19. Amount in Controversy—Estimation of Subject Matter.
- 20. Amount in Controversy—Things Inestimable—Amount How  
Shown—Fictitious Valuation—Change in Value.
- 21. Amount Must Be Directly Involved—Joining Claims.

§ 1. **Diversity Between Really Opposite Parties to be Complete—Realignment.**—The diversity of citizenship between the opposing sides to a controversy (which depends for federal justiciability solely upon that ground) must be complete; otherwise the limited jurisdiction under the statute will not exist. The totality of interest on each side must be completely qualified in every part with diversity relative to the totality of interest on the other side. In other words,

every real actor on either side of the actual controversy must be capable of maintaining an action in the federal court, on the ground of diversity of citizenship, against every real actor upon the opposite side.<sup>1</sup>

The doubt suggested in *Strawbridge v. Curtis*,<sup>2</sup> as to whether the rule stated should not be limited to cases where the rights asserted are *joint*, seems to have been resolved by holding that where parties elect to join, the court will always assume that they intend to assert a joint cause of action.<sup>3</sup>

The Court will, in passing upon the question of jurisdiction, observe the distinction heretofore made between nominal and real parties; because as to nominal parties there is really no actual controversy at all.<sup>4</sup>

In cases in equity arising under the original jurisdiction, the court will undertake to realign the parties, no matter how arranged in the bill, in their proper places as plaintiffs or defendants, according to their interest in the controversy; and in determining the total diversity of citizenship will regard all parties as transposed to their antagonistic sides. Unless this should be done, the pleader might readily, under the loose and flexible system of equity pleading, contrive to so shift his parties as to found a superficial antagonism between parties whose interests in the claim are plainly identical.<sup>5</sup>

<sup>1</sup> *Strawbridge v. Curtis*, 3 Cranch. 267; *New Orleans v. Winter*, 1 Wheat. 91; *Coal Co. v. Blatchford*, 11 Wall. 172; *Peninsular Iron Co. v. Stone*, 121 U. S. 631; *Smith v. Lyon*, 133 U. S. 315; *Hoe v. Jamison*, 166 U. S. 395; *Wilson v. Oswego Township*, 151 U. S. 1 c. 63.

<sup>2</sup> 3 Cranch. 267.

<sup>3</sup> *New Orleans v. Winter*, 1 Wheat. 91; *Smith v. Lyon*, 133 U. S. 315; *Peninsular Iron Co. v. Stone*, 121 U. S. 631; *Hoe v. Jamison*, 166 U. S. 395.

<sup>4</sup> *Wormley v. Wormley*, 8 Wheat. 421; *Wood v. Davis*, 18 How. 467; *Wilson v. Oswego Township*, 151 U. S. 56.

<sup>5</sup> *Pacific R. Co. v. Ketchum*, 101 U. S. 289; *Dawson v. Columbia, Etc., Co.*, 197 U. S. 178; *Allen-West Co. v. Brashear*, 176 Fed. 119; *First Nat. Bank v. Radford*, 80 Fed. 569; *Consolidated Water Co. v. Babcock*, 76 Fed. 243.

Generally speaking, there can be little room for the application of this practice in a suit at common law under the original jurisdiction. Where parties join as plaintiffs at law, they presumably do so because they have and desire to assert a joint cause of action. So where real parties are joined as defendants, the plaintiff apparently seeks a judgment against all or none. The court can hardly be in a situation to make his election for him. Where, however, a code provision adopts equitable practices, as when it provides that in law cases a person who is united in interest but refuses to join with the plaintiff, shall be made a defendant, the federal court would necessarily, I presume, regard him as a plaintiff for the purposes of jurisdiction.<sup>5a</sup> Other peculiar statutory proceedings may call for the application of the same rule at law.

**§ 2. Initial Diversity Intended—May Appear from Any Part of Record—Amendment of—Record to Show.**—The diversity of citizenship upon which the jurisdiction rests must exist at the time the action is commenced.<sup>6</sup> Having once attached, the jurisdiction is not ousted by any subsequent change in the citizenship of the parties;<sup>7</sup> and it is corollary that initial lack of diversity is not cured by subsequent accrual, and that no change in or substitution for the original parties will be permitted to oust the court of its jurisdiction, rightfully acquired.<sup>8</sup>

Unlike the rule with respect to the jurisdiction based upon the involution of a federal question, which has no existence until it appears and must be exhibited in the opening plead-

<sup>5a</sup> But Cf. *Omaha, Etc., Co. v. Wade*, 97 U. S. 13.

<sup>6</sup> *Mollan v. Torrance*, 9 Wheat. 537; *Connolly v. Taylor*, 2 Pet. 556; *Cook v. Lillo*, 103 U. S. 792; *Metcalf v. Watertown*, 128 U. S. 586; *Morris v. Gilmer*, 129 U. S. 315; *Anderson v. Watt*, 138 U. S. 694.

<sup>7</sup> *Morgan v. Morgan*, 2 Wheat. 290; *Mollan v. Torrance*, 9 Wheat. 537; *Kanonse v. Martin*, 15 How. 198; *Louisville, Etc., Co. v. Trust Co.*, 174 U. S. 552.

<sup>8</sup> *Clarke v. Matthewson*, 12 Pet. 164; *Florida v. Georgia*, 17 How. 1. c. 508; *Phelps v. Oaks*, 117 U. S. 236; *Hardenbergh v. Ray*, 151 U. S. 112.



§ 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ing and not elsewhere, diversity of citizenship sufficiently appears as a basis of jurisdiction by any part of the record.<sup>9</sup>

If such diversity actually existed at the beginning of the judicial controversy, there was in fact jurisdiction though it did not appear; and no subsequent course of the cause or conduct of the parties can alter that fact. Hence the difference in rule between diversity of citizenship and federal question. In view of the duty imposed upon the court to dismiss at any time causes not within the jurisdiction, it is hardly prudent to neglect a categorical statement of citizenship in the declaration or bill, where it properly belongs.

It has been recently provided, by an amendment to the Judicial Code, that wherever, in any suit brought in or removed to the District Court, the diverse citizenship supporting the jurisdiction is *defectively alleged* (though in fact existing at the time the suit was brought or removed) an amendment may be made, upon proper terms, either in the District or Appellate Court.<sup>10</sup>

§ 3. **Original Jurisdiction in District Court When State is Party—Aliens—Aliens and Citizens.**—The immunity of a state from being made *defendant* against its will, at the suit of individuals, does not affect the constitutional power of Congress to vest in the federal courts jurisdiction of suits “between a state or the citizens thereof, and foreign states, citizens or subjects,” or “between a state and the citizens of another state,” where the state is the *plaintiff*.<sup>11</sup>

It will be observed, however, from our catalogue of original jurisdiction, that the present statute confers no jurisdiction upon the District Courts in cases where a state is a party,

<sup>9</sup> *Sun Printing Ass'n v. Edwards*, 194 U. S. 382; *Mexican Central Ry. v. Pinkney*, 149 U. S. 194; *Gordon v. Chattanooga Bank*, 144 U. S. 97; *Robertson v. Cease*, 97 U. S. 646; *Railway Co. v. Ramsey*, 22 Wall. 322.

<sup>10</sup> J. C., Sec. 274c; Act of March 3, 1915.

<sup>11</sup> Cf. Const. Art. 3, Sec. 2; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553; *Florida v. Anderson*, 91 U. S. 667; *Minnesota v. Northern Sec. Co.*, 184 U. S. 199.

but limits the jurisdiction to cases “between citizens of a state and foreign states, citizens or subjects.”<sup>12</sup>

This does not prevent the jurisdiction of the District Courts from attaching in all cases arising under the constitution, laws or treaties of the United States, where the requisite amount is in controversy, even though a state be the party plaintiff.<sup>13</sup>

Suits between aliens are not justiciable in the courts of the United States on other than federal grounds.<sup>14</sup>

There must be an alien on one side and a citizen on the other to support the jurisdiction on the basis of diversity. Whether *between*, as used in the *constitution*, imports that all parties on one side of the controversy must be of the same class, either aliens or citizens, or whether it is in the power of Congress, by clear enactment, to provide, for example, that the federal courts shall hear and determine the whole case, because of the presence therein of an alien and a citizen on opposite sides, *regardless* of the citizenship of the other parties, has, so far as I am aware, never been squarely decided by the Supreme Court. My opinion is against the power suggested.

The statutes apportioning jurisdiction have always used the term “between,” and those statutes have been consistently interpreted as importing complete diversity. It has been held that the United States Supreme Court has no original jurisdiction between a state on the one side and citizens of other states, sued jointly with its own citizens.<sup>15</sup> The dissenting

<sup>12</sup> J. C., Sec. 24, cl. 1.

<sup>13</sup> *Ames v. Kansas*, 111 U. S. 449; *Stone v. South Carolina*, 117 U. S. 430; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473; *Southern Pac. Co. v. California*, 118 U. S. 109; *Arkansas v. Coal Co.*, 96 Fed. 355.

<sup>14</sup> *Montalet v. Murray*, 4 Cranch. 46; *Mossman v. Higginson*, 4 Dallas 12; *Hodgson v. Bower Bank*, 5 Cranch. 303; *Jackson v. Twentyman*, 2 Pet. 136; *Connolly v. Taylor*, 2 Pet. 556; *Gage v. Riverside Trust Co.*, 156 Fed. 1002.

<sup>15</sup> *California v. Southern Pac. Co.*, 157 U. S. 229; *Minnesota v. Northern Sec. Co.*, 184 U. S. 199.

opinion in the first case just cited, asserts that where a controversy within federal jurisdiction is present, as where there is a state on one side of the dispute, and an alien or citizen of another state on the other, the rest of the case might be treated as incidental. The same question was presented in the case of the Sewing Machines Companies,<sup>16</sup> but the Court refused to discuss the constitutional power and confined itself to the settled meaning of the statutes.

Strict logic would equally require that, since the language of the statute is "between citizens of a state *and* foreign states, citizens or subjects," A and B, citizens respectively of New York and New Jersey (*different* states), could neither sue nor be sued by aliens; nor could A, a citizen of New York, sue an alien *and* B, a citizen of New Jersey.

Some decisions support the latter,<sup>17</sup> but, although the Supreme Court has never directly passed upon the proposition, the great weight of authority in the inferior federal courts sustains the jurisdiction.<sup>18</sup> The term alien means one who is a subject of and owes allegiance to another country. *Residence* is immaterial.<sup>19</sup>

§ 4. **Ancillary Jurisdiction.**—By way of qualification of the rules heretofore laid down, I must call your attention to a class of proceedings which are known as *ancillary*, auxiliary or supplementary. This ancillary jurisdiction is independent of all the rules and limitations prescribed as peculiarly applicable to the jurisdiction of the federal courts. It springs from the fundamental duty of justice and the correlative duty of efficiency owed by every court that undertakes to declare and establish rights of parties litigant; and as its name indi-

<sup>16</sup> 18 Wall. 553.

<sup>17</sup> Tracy v. Morel, 88 Fed. 801; Hervey v. Ill. Midland Co., 7 Bissell 103.

<sup>18</sup> Ballin v. Lehr, 24 Fed. 193; Roberts v. Pacific, Etc., Co., 121 Fed. 785; Ladew v. Copper Co., 179 Fed. 245; Baker v. Pinkham, 211 Fed. 728; Ryan v. Ohmer, 233 Fed. 165.

<sup>19</sup> Cf. Richardson, Etc., Co. v. Hennessy, 189 U. S. 25; Breedlove v. Nicolet, 7 Pet. 1. c. 431.

cates, is appurtenant to some prior or principal proceeding in the same court in which the jurisdiction has been competently invoked.

Generalizing, it exists with respect to two subject matters, viz.: (a) Property within *or* treated as within the court's administrative control, and (b) the records and processes of the court in the principal proceedings. The importance of the subject demands most earnest scrutiny.

**§ 5. Ancillary Jurisdiction—Property in Actual or Potential Possession.**—Where property in dispute has been taken into the actual custody of a court of competent jurisdiction, such custody cannot be interfered with by any court of co-ordinate or inferior jurisdiction; but the court, having possession of the property, for the purposes for which its proper jurisdiction is invoked, has ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of such property, though unauthorized so to do by any statute, and irrespective of the quality of the question or the citizenship of the parties. The power of the court to deal with the property it has taken must be left untrammelled to prevent unseemly conflict and confusion of jurisdiction. Such ancillary proceedings, while not confined to, are most frequent in equity proceedings; and are matters of daily practice in the bankruptcy courts.<sup>20</sup>

Such a rule of non-interference between courts of the same sovereignty is a principle of comity, and its limits are usually established with a view to convenience and utility. As between the courts of the United States and those of the states, which are regarded as courts of distinct sovereignties, owing to their respective creators, the full performance of the pow-

<sup>20</sup> *Morgan's L. & T. Co. v. Texas, Etc., Ry. Co.*, 137 U. S. 171; *People's Bank v. Calhoun*, 102 U. S. 256; *Murphy v. John Hofman Co.*, 211 U. S. 562; *Byers v. McAuley*, 149 U. S. 608; *Porter v. Sabin*, 149 U. S. 473; *Compton v. Jesup*, 68 Fed. 263; *Continental, Etc., Co. v. Toledo, Etc., Co.*, 82 Fed. 642; *Park v. N. Y., Etc., R. R. Co.*, 70 Fed. 641.

ers of jurisdiction vested in them, the principle is exalted into a rule of self-preservation and necessity.<sup>21</sup>

If, when property was seized upon execution or attached by process issuing from a federal court, as the property of A, X and Z could bring an action of replevin against the marshal, in the state court, and take from him the seizure, upon the ground that it belonged to them, it would be within the power of the state court to pluck from the judgment of the federal court all its value and effectiveness. The property would be gone from the office of the court; there would be left in its place a bond in the approval of which the United States had no voice, and which is suable only in the event of a particular decision by an independent tribunal. The federal courts must then await the pleasure of the state courts, through trial and successive appeals, in the subordinate controversy; submitting at the end, it may be, to an erroneous decision it is powerless to correct, or leaving to the confiding invocant of its powers a long and protracted litigation upon a replevin bond of doubtful or impaired responsibility. No agency of a sovereign power could brook such interference; it would nullify the meaning of *jurisdiction*.<sup>22</sup>

The same principles, *mutatis mutandis*, would apply in favor of state courts, as against federal interference.<sup>23</sup> So where a federal court of equity has appointed a receiver who has taken possession of property, his possession is that of the court. The property is deemed *in custodia legis*, for the purposes of administration, and any attempt to disturb that possession by state officers or any other person claiming a right thereto, without leave of court, is a punishable contempt; and this is true no matter how clear may be their right to possession. It is settled and established in the jurisprudence of the United States, and especially as between fed-

<sup>21</sup> Covell v. Heyman, 111 U. S. 176; *Ex parte* Tyler, 149 U. S. 1. c. 186.

<sup>22</sup> Cf. Freeman v. Howe, 24 How. 450; Lammon v. Feusier, 111 U. S. 17; Buck v. Colbath, 3 Wall. 334.

<sup>23</sup> Cf. Taylor v. Carryl. 20 How. 583; Gumbel v. Pitkin, 124 U. S. 131.

eral and state tribunals, that a court having possession of property cannot be deprived of the right to deal with such property, until its jurisdiction is exhausted; and that no other court has the right to interfere with such custody or possession.<sup>24</sup>

While there is some conflict of opinion, the rule is not always confined to actual seizure. There seems to be recognized, in certain cases, a sort of constructive control and potential *custodia legis*, as against property not in actual possession. For example, where a receiver is appointed by a federal court over a corporation, suits brought by the receiver in that court to recover property or realize upon obligations, constituting a part of the trust estate, fall within the ancillary jurisdiction, regardless of such matters as diversity of citizenship or amount in controversy.<sup>24a</sup>

In suits to enforce a lien against specific property, to marshal assets, administer trusts, liquidate insolvent estates, and other cases of a similar character, where in the course of the litigation the court may be compelled to assume possession and control of the property affected the court which first obtains jurisdiction by the issuance (or at least by the issuance and service) of process, is entitled to retain it, so far as necessary for its purposes, to the exclusion of all other courts of co-ordinate jurisdiction.<sup>25</sup>

It may be observed that the cases last mentioned approximate proceedings *in rem*, and that the judgment of the court

<sup>24</sup> *Milwaukee, Etc., Ry. Co. v. Soutter*, 2 Wall. 609; *Wiswall v. Sampson*, 14 How. 52; *Ex parte Johnson*, 167 U. S. 1. c. 125; *Rouse v. Letcher*, 156 U. S. 47; *Ex parte Chetwood*, 165 U. S. 443; *Ex parte Tyler*, 149 U. S. 164; *Hitz v. Jenks*, 185 U. S. 155.

<sup>24a</sup> Cf. *White v. Ewing*, 159 U. S. 36; *Kirkland v. Knox*, 230 Fed. 806; *Hollander v. Heaslip*, 222 Fed. 808; *Whelan v. Enterprise Co.*, 164 Fed. 95; *Cooper v. Newton*, 160 Fed. 190; *Brown v. Allerbach*, 156 Fed. 697; *Gunby v. Armstrong*, 133 Fed. 417.

<sup>25</sup> *Farmers Loan, Etc., Co. v. Lake St., Etc., Co.*, 177 U. S. 1. c. 61; *Memphis Savings Bank v. Houchens*, 115 Fed. 96; *Palmer v. Texas*, 212 U. S. 118; *Hirsch v. Independent Steel Co.*, 196 Fed. 104; *Central, Etc., Co. v. Bridges*, 57 Fed. 753.

cannot be executed, without the assertion of an inchoate dominion *ab initio*.

§ 6. **Remedies to Recover Property.**—It would be a violation of fundamental justice, as well as of constitutional right, were the owner or claimant of property seized and held, to be left without remedy; but that remedy (at least if it be of a character to obstruct the jurisdiction already asserted) must be sought in the particular court holding the property. It has been held that the inability to make use of the ordinary remedies at law for tortious seizure founds a right to relief upon the equity side of the particular court; but the assertion of the right need not be confined to this peculiar mode and the form of the proceeding should be determined by the circumstances of the instant case.<sup>26</sup>

“If the original cause in which the process has issued, or the property or fund is held is in equity, the intervention will be by petition *pro interesse suo*, or by a more formal, but dependent bill; in some cases, in a summary way, by motion merely supported by affidavits. In actions at law where goods have been taken in execution after judgment or upon attachment before, a proceeding in the nature of an interpleader might be appropriately ordered by the court . . . and in that the respective rights of the claimant to the property could generally be tried as in an action at law by a jury, upon a formal issue framed for that purpose. If the statute of the state contained provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the courts, as contemplated by Sections 914, 915 and 916 of the Revised Statutes. In whatever form, however, the rights of the parties will be preserved and protected against judicial error and the final decree or judgment will be reviewable, according to the nature of the case’<sup>27</sup>

<sup>26</sup> *Krippendorf v. Hyde*, 110 U. S. 276.

<sup>27</sup> *Ibid.*

§ 7. **Ancillary Jurisdiction—Records and Processes to Enforce Judgments.**—The records and processes of a court in the exercise of its jurisdiction are regarded as peculiarly within its custody and control, and no other court can ordinarily, except in pursuance of appellate or revisory powers, undertake to annul, correct, modify, expunge, restrain, regulate or set aside its judgment, orders and proceedings. Even where, in another suit and in a different court, a judgment is asserted to have been procured by fraud, the real theory of the attack is not a cancellation of the judgment from the rolls of the court rendering it, but a refusal to permit the party, claiming under the judgment, to take advantage of his own wrong; and where a judgment rendered by another court is shown to be unsupported by jurisdiction, it is in effect disregarded, but not actually expunged.<sup>28</sup>

It must be remembered that the actual accomplishment of justice is the very *ratio essendi* of courts and their investiture with jurisdiction. That purpose would not be satisfied, in the present fallibility of human nature, were the powers of the court to end with the rendition of a paper decree. That decree must be enforced and put into actual and final effect within the territorial jurisdiction between the parties and their privies. It is therefore settled that the jurisdiction persists, until the judgment, in its true intent and meaning, be completely satisfied; and in the pursuance of this satisfaction, all co-ordinate courts, and especially the federal and state courts, are entitled to pursue as against each other, within the limits of their jurisdiction, their independent and untrammelled ways toward that consummation.<sup>29</sup>

Within the limits of the powers conceded by the historical policy of the law, a court may set aside, correct, construe, restrain, enforce, regulate and control its records and processes, in so far as such action affects the rights and interests of

<sup>28</sup> Barrow v. Hunton, 98 U. S. 80; Johnson v. Waters, 111 U. S. 640; Marshall v. Holmes, 141 U. S. 589.

<sup>29</sup> Central National Bank v. Stevens, 169 U. S. 432; Riverdale Cotton Mills v. Alabama, Etc., Co., 198 U. S. 188.



those who were the parties to the making or issuance of such records and processes, or who are privy in derivation of right and interest to those parties; and such action is to be regarded as ancillary to the principal action in which the records and processes were made or issued and as dependent from and inherent in the jurisdiction originally asserted.<sup>29a</sup>

It must be especially observed that the distinction here made between original or independent, and ancillary or supplementary proceedings, while in occasional respects coincident with the distinction in equity pleading between original and supplementary proceedings, is not the same and must not be confounded therewith.<sup>30</sup>

In certain ancillary proceedings, the defendant, by reason of his connection with the principal action, is deemed to be so constructively subject to the jurisdiction, that substituted process may be served upon his local attorney, or even outside the district, when so ordered by the Court. The precise limits of this theory are difficult to state, and I shall not attempt it. The most usual instances are where the defendant at law seeks to restrain, upon equitable grounds, the prosecution of the action or the execution of an unenforced judgment; or where a person originally made, or permitted to intervene as, a defendant in equity, files a crossbill. If unrelated matters or new parties are brought in, however, the proceeding, to that extent at least, ceases to be ancillary.<sup>30a</sup>

<sup>29a</sup> *Root v. Woolworth*, 150 U. S. 411.

<sup>30</sup> *Milwaukee, Etc., Ry. Co. v. Soutter*, 2 Wall. 609; *Carey v. Houston, Etc., Ry. Co.*, 161 U. S. 115.

<sup>30a</sup> Cf. *Logan v. Patrick*, 5 Cranch. 288; *Milwaukee, Etc., R. R. Co. v. Soutter*, 2 Wall. 609; *Jones v. Andrews*, 10 Wall. 327; *French v. Hay*, 22 Wall. 250; *Segee v. Thomas*, 3 Blatchf. 11; *Williams v. Byrne*, Hempst. 472; *Lowenstein v. Glidewell*, 5 Dill. 325; *Kamm v. Stark*, 1 Sawy. 547; *Pac. R. R. Co. v. Mo. Pac. R. R. Co.*, 3 Fed. 772; *Gasquet v. Fidelity, Etc., Co.*, 57 Fed. 80; *Bowen v. Christian*, 16 Fed. 729; *Manning v. Berdan*, 132 Fed. 382; *Bartlett v. The Sultan*, 19 Fed. 346; *Abraham v. Ins. Co.*, 37 Fed. 731; *Rubber Co. v. Goodyear*, 9 Wall. 807; *Conwell v. Water Co.*, 4 Biss. l. c. 198; *American Surety Co. v. Lawrence*, 96 Fed. l. c. 31.

§ 8. **Classification Illustrative — Ancillary Instances at Law.**—It must be manifest upon deliberate examination that the attempted classification of the ancillary jurisdiction, with respect to (a) property in actual or assumed control, and (b) matters of record and process, is not scientific, but illustrative, and that the two classes run into each other. Without attempting to keep separately assigned the respective instances, the following are cited as examples of the jurisdiction ancillary to proceedings at law. A petition for restoration into the hands of the sheriff of goods taken from his possession by the marshal in attachment proceedings, on the grounds of previous valid seizures by the state officer;<sup>31</sup> a motion for judgment, authorized by local practice, against the marshal for failure to pay over to plaintiff the proceeds of an execution issued by the court upon its judgment;<sup>32</sup> petition for mandamus to compel the levy of taxes by a municipal body, in order to satisfy a judgment rendered by the court applied to;<sup>33</sup> an ancillary bill, on the equity side of the court filed by the owner of attached property to recover the same or its proceeds against the marshal and the parties to the attachment suit;<sup>34</sup> a motion to set aside a judgment for irregularity;<sup>35</sup> a *scire facias* to enforce a judgment or recognition;<sup>36</sup> a bill upon the equity side, to enjoin the execution of a judgment in ejectment, recovered in the same court, setting up equitable defenses which could not have been interposed in the original proceeding;<sup>37</sup> a bill upon the equity side to enjoin the prosecution, by an insolvent corporation plaintiff on the law side of the same court, of a claim for breach of contract, and to charge by creditor's bill against

<sup>31</sup> *Gumbel v. Pitkin*, 113 U. S. 545.

<sup>32</sup> *Gwin v. Breedlove*, 2 How. 29.

<sup>33</sup> *Davenport v. Dodge County*, 105 U. S. 237; *Rosenbaum v. Bauer*, 120 U. S. 450; *Riggs v. Johnson County*, 6 Wall. 166; *Knox County v. Aspinwall*, 24 How. 376; *Labette County v. U. S.*, 112 U. S. 217.

<sup>34</sup> *Krippendorf v. Hyde*, 110 U. S. 276.

<sup>35</sup> *Barrow v. Hunton*, 99 U. S. 80.

<sup>36</sup> *Pullman Car Co. v. Washburn*, 66 Fed. 790.

<sup>37</sup> *Simms v. Guthrie*, 9 Cranch. 19; *Johnson v. Christian*, 125 U. S. 642; *Milwaukee, Etc., R. R. Co. v. Soutter*, 2 Wall. 609.

its assets in the hands of a fraudulent grantee, a claim for damages arising out of the contract (the state law so permitting);<sup>38</sup> a rule to show cause why judgment should not be entered against a surety on a forthcoming bond, in the principal action, in accordance with adopted state practice;<sup>38a</sup> a bill upon the equity side, to restrain the prosecution of a garnishment proceeding at law in the same court, and praying the allowance of a set-off;<sup>39</sup> a petition for restitution of what has been paid upon an erroneous judgment, which has been reversed and remanded;<sup>40</sup> a bill brought on the equity side, by an assignee of school board warrants, who has recovered judgment thereon in the same court, to compel the application to such judgment of taxes held by the municipality for the use of the school board;<sup>41</sup> a bill upon the equity side, to stay proceedings at law in the same court;<sup>42</sup> a bill upon the equity side, to enforce an equitable estate in land, and to enjoin the execution of a judgment at law in favor of the holders of the legal title;<sup>43</sup> a bill for injunction, to restrain action upon a replevin bond, even in a state court, where the plaintiff in the replevin (under the then existing law) had filed petition and bond for removal, but that state court had nevertheless proceeded to judgment against him, whereas the judgment in the federal court, upon removal, had been in his favor, and the injunction was necessary to protect and effectuate the fruits of the federal judgment.<sup>44</sup>

§ 9. **Ancillary Instances in Equity.**—The following, among many others, have been regarded as ancillary to original proceedings in equity:

A bill by federal receivers to protect railroad land grants

<sup>38</sup> *Dewey v. West Fairmount Gas Co.*, 123 U. S. 329.

<sup>38a</sup> *Reilly v. Golding*, 10 Wall. 56.

<sup>39</sup> *Jones v. Andrews*, 10 Wall. 327.

<sup>40</sup> *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

<sup>41</sup> *New Orleans v. Fisher*, 180 U. S. 185.

<sup>42</sup> *Logan v. Patrick*, 5 Cranch. 288.

<sup>43</sup> *Webb v. Barnwall*, 116 U. S. 193.

<sup>44</sup> *Kern v. Huldekoper*, 103 U. S. 494.

committed to their administration from attempted nullification by state officers acting under unconstitutional laws;<sup>45</sup> a suit in equity by a corporation to set aside a decree of foreclosure fraudulently obtained against it, through the connivance of faithless counsel and directors;<sup>46</sup> a suit to prevent the relitigation, by parties to a former proceedings, of the questions decided therein, and to protect the title thereby confirmed;<sup>47</sup> a crossbill filed to enforce judgment of the same court, which is sought by the bill to be set aside;<sup>48</sup> a bill by stockholders of a corporation to set aside a decree of same court against the corporation upon grounds of collusion and fraud and that court had no jurisdiction;<sup>49</sup> a bill by a receiver in the court of his appointment to compel defendants to surrender to him certain property and rights claimed to belong to him under his order of appointment;<sup>50</sup> a bill by a purchaser under a foreclosure proceeding in the same court, to which he has been made a party by the decree, to prevent the impairment or nullification of that decree by a subsequent state judgment affecting the property purchased;<sup>51</sup> a bill of revivor;<sup>51a</sup> an intervening petition by a widow to charge the property in the hands of receivers, with liability for damages for the killing of her husband by the negligent operation of the receivers;<sup>52</sup> a crossbill asserting rights to property in the hands of a receiver appointed in foreclosure proceedings;<sup>53</sup> suits by or against a federal receiver of an insolvent corporation, in the course of winding up the same, for the collection of its assets or defense of its property

<sup>45</sup> *Davis v. Gray*, 16 Wall. 203.

<sup>46</sup> *Pac. R. R. Co. v. Mo. Pac. Ry. Co.*, 111 U. S. 505.

<sup>47</sup> *Root v. Woolworth*, 150 U. S. 401; *Riverdale Mills v. Alabama, Etc., Co.*, 198 U. S. 188.

<sup>48</sup> *M. & M. R. R. Co. v. Chamberlain*, 73 U. S. 748.

<sup>49</sup> *Carey v. Houston, Etc., R. R. Co.*, 161 U. S. 115.

<sup>50</sup> *Pope v. Louisville, Etc., R. R. Co.*, 173 U. S. 573.

<sup>51</sup> *Julian v. Central Trust Co.*, 193 U. S. 93.

<sup>51a</sup> *Clarke v. Matthewson*, 12 Pet. 164.

<sup>52</sup> *Rouse v. Letcher*, 156 U. S. 47.

<sup>53</sup> *Morgan's L. & T. Co. v. Texas, Etc., Co.*, 137 U. S. 171.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

rights;<sup>54</sup> a bill to impeach a decree for fraud;<sup>55</sup> a bill of review, to set aside a decree upon the grounds of error and mistake;<sup>56</sup> a bill to carry a decree into execution;<sup>57</sup> and a bill to construe a decree.<sup>58</sup>

§ 10. **Suits Against Receivers.**—Section 66 of the Judicial Code qualifies to some extent the rule with respect to receivers. That section provided that “every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which said manager or receiver was appointed so far as the same may be necessary to the ends of justice.”

Prior to the enactment of this section in 1887, it was the law that a receiver could only be sued by permission of the court appointing him. The reason for that rule was that the judgment in a suit against a receiver would be against him in his official capacity, and execution would run against the property in his hands as such. The effect would be to subtract from the property in the hands of the court, and to destroy to that extent its power, as against another coordinate tribunal, to hold and administer that property. Furthermore, the suit must have been defended by the receiver in his official capacity, and great expense frequently entailed, were such unauthorized suits to be permitted.<sup>59</sup> “It was for that court, in its discretion, to decide whether it will determine for itself all claims of or against its receiver or . . . allow them to be litigated elsewhere. Any claim against

<sup>54</sup> *White v. Ewing*, 159 U. S. 36; *Pope v. Louisville, Etc., R. R. Co.*, 173 U. S. 573.

<sup>55</sup> *Lacassagne v. Chapins*, 144 U. S. 119.

<sup>56</sup> *Oglesby v. Attrill*, 12 Fed. 227.

<sup>57</sup> *Root v. Woolworth*, 150 U. S. 401.

<sup>58</sup> *Jenks v. Brewster*, 96 Fed. 625.

<sup>59</sup> *Barton v. Barbour*, 104 U. S. 126; *Davis v. Gray*, 16 Wall. 203.

the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him.<sup>60</sup>

The effect of the statute has been to change this rule and to confer independent jurisdiction, as to the matters and to the extent specified, upon other courts of competent authority.

**§ 11. Amount in Controversy—Law and Equity.**—There is a still further qualification of the second great class of the original jurisdiction, and that is the involution of a minimum amount in the controversy. The language of the state is “. . . All suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars.”

In all cases attention should be first directed to the ascertainment of precisely what the matter in controversy actually is, and then to the estimation of its amount or value. Where there are only two persons directly concerned in the suit, and each of the two on opposite sides, there is usually little difficulty in dealing with this limitation. This chief trouble arises in cases where there is an aggregation of claims or a plurality of persons interested.

The statute suggests a division between suits at law and in equity, and we can do no better than to follow the lines of cleavage thus indicated. An action at common law may be brought by one or more as plaintiffs and against one or more as defendants. Absent misjoinder, the plaintiff, whether one or composite of a number of persons, represents an integral interest. If there be more than one plaintiff, then each of the several persons composing the collective plaintiff must be jointly interested in the whole and every part of the cause of action asserted in the litigation, and this is true whether the action lie in contract or in tort. In general, the same

<sup>60</sup> Porter v. Sabin, 149 U. S. 473.

§ 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

rule applies to defendants; except that at common law torts are joint and several for purposes of liability, and one, any or all of the joint wrongdoers may be sued at will. By statutes prevailing in many jurisdictions contractual liabilities are subordinated to the tort rule. But whether in contract or tort, the general rule is that each defendant is charged with responsibility for the whole reparation demanded, and the judgment awarding that reparation is for the whole amount recovered, *in solido*, against some or all of the defendants, and in favor of the plaintiffs collectively. In other words, a common law controversy imports two definite and opposite sides, and the matter in controversy imports a stake to be taken from one side and awarded to the other. Whatever the totality of parties on one side gains the totality of parties on the other side loses, and the stake whether considered as loss or gain is necessarily the same respect to either side.

§ 12. **Amount in Controversy—Suits at Law.**—If, therefore, A and B should sue C and D, to recover a debt of \$3,001.00, both A and B must be owed that same sum and every part of it, in order that there may be a federal recovery. If it appears that A only is owed \$1,500.50, and B is owed \$1,500.50, then there are two stakes in the suit; and therefore in a jurisdictional sense two controversies, neither involving the jurisdictional amount.

So if C only should owe A and B \$1,500.50, and D only should owe them an equal amount, the result would be the same. I do not understand that this result is altered for the purposes of federal jurisdiction, by the permissive joinder of such claims or liabilities, under state statute, in the same proceeding; and it would equally hold with respect to the attempted recovery of specific real or personal property.

Thus where the plaintiff brought an action for the recovery of several parcels of land, occupied by as many separate defendants, but the action was not directed against them as joint disseisors or joint possessors, there are as many separate and distinct controversies as there are parcels of land, and the amounts in dispute are the respective value of each

parcel; but the matter would be quite otherwise if the separate parcels were jointly taken and held by all the defendants.<sup>61</sup>

Where, under the provisions of a state statute, various lien claimants are authorized to join in an action to enforce their respective claims, involving separate contracts, separate evidence, and separate awards in the judgment, there are as many controversies as there are claimants, and there can be no aggregation of all the claims to make up the requisite amount in controversy.<sup>62</sup>

§ 13. **Amount in Controversy—Suits at Law.**—Generally speaking, then, in an action at law for the recovery of a money judgment, the amount in controversy is the amount of money sought in good faith to be recovered by an integral plaintiff against an integral defendant. Where property, real or personal, is sought to be specifically recovered as the property of the plaintiff, the test is the value of the property sought to be specifically regained. The value of the property sued for, however, in cases where specific recovery thereof is sought is not always the measure of the controversy. In replevin, for instance, if the action is brought as a means of trying title to the property, the value of the property replevined is the matter in dispute; but if the replevin is of property distrained for rent, the amount for which the avowry is made is the real matter in dispute and the test of jurisdiction;<sup>63</sup> and where the object of a suit is to apply property worth more to the payment of a debt of less than the jurisdictional amount, it is the amount of the debt, and not the value of the property, that determines the jurisdiction of the court.<sup>64</sup>

§ 14. **Amount in Controversy—Suits in Equity—Plaintiffs.**—A court of equity is not confined to the simple unity

<sup>61</sup> *Tupper v. Wise*, 110 U. S. 398; *Lynch v. Bailey*, 110 U. S. 400; *Friend v. Wise*, 111 U. S. 797; *Tupino v. Compania General*, 214 U. S. 268.

<sup>62</sup> *Holt v. Bergwin*, 60 Fed. 1.

<sup>63</sup> *Peyton v. Robinson*, 9 Wheat. 527.

<sup>64</sup> *Gibson v. Shufeldt*, 122 U. S. 27.



§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

of interests and controversy that mark the pure common-law proceeding. Its fundamental maxim is the doing of full and complete justice and in dealing with property and property rights it would be impossible to carry out that high purpose, unless it liberalized the strict and procrustean character of the common-law rules relating to parties. The flexibility of its judgment in adjusting the various interests that revolve around a given matter, the variety of its remedies, and particularly their protective and administrative quality, render much more difficult the determination of the value or sum in controversy.

I believe it will be found upon attentive examination, however, that the rules in equity, at points where the situation is analogous, are strongly suggestive of the corresponding rules at law.

For the sake of clarity, let us deal first with a plurality of plaintiffs. The test here, where the claim is to recover money or property, is whether the plaintiffs claim it under such a joint or common right that the adverse party or parties have no interest or concern in the apportionment or distribution of the fruits of the litigation; or whether the plaintiffs whose joinder in equity is permitted for the sake of convenience, claim the money or property under separate and distinct rights, each of which is contested by the adverse party.<sup>65</sup>

Thus in one of the earliest cases dealing with this subject, the legal representatives of an intestate, who would seem to have been entitled under the laws of the intestate's domicile to unequal shares in his estate by way of distribution brought an action at equity to compel the defendant to pay over to them a large sum of money belonging to the intestate, which had been by the defendant converted to his own use. A decree was awarded against the defendant for the entire sum, but directed the apportionment of this sum among the several plaintiffs in accordance with their respective interests therein in accordance with the rules laid down by the statutes of distribution. The defendant had in the meantime moved to

<sup>65</sup> Gibson v. Shufeldt, 122 U. S. 27.

another state, and a bill was thereupon brought in the new state, in the federal court, by the representatives of the intestate to enforce the payment to them under the old decree, of their respective shares. Some of these shares were for less than the jurisdictional amount. Upon a decree being entered in conformity with the prayer of the bill, the defendant appealed to the Supreme Court. "The matter in controversy," said Chief Justice Taney, "was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on this contract and the sum in dispute upon it exceeds the jurisdictional amount, an appeal would clearly lie to this court, though the interest of each individual was less than this sum."<sup>66</sup> While it is not safe in my judgment, in all cases to rely upon the analogy of cases relating to the amount in controversy for the purposes of appeal, because among other reasons the test is at opposite ends of the case, yet the tests applied for the purpose of determining whether there is one controversy or many ought to hold good for either class of questions. An almost perfect counterpart to this case, on the law side, is presented by another case of more recent origin. A state statute provided that the action for wrongful death should be brought by the surviving wife or husband, children and parents of the deceased, and that the judgment should be for a total sum fixed by the verdict, to be

<sup>66</sup> *Shields v. Thomas*, 17 How. 3.

apportioned thereby among the plaintiffs. It was held for purposes of error by a defendant that the amount in controversy was the whole liability; the issue being between the opposite sides as to the total amount of recovery for the one wrong done to them jointly, and the defendant having no concern as to how it should be distributed.<sup>67</sup>

In admiralty cases, the same rule applies as in equity; and the distinction for appellate jurisdiction is between cases where the plaintiffs have a joint and common interest, so that the defendants have nothing to do with the question of apportionment, and cases where the plaintiffs assert separate rights or claims, each of which is contestable by the adverse parties.<sup>68</sup> So where shipping articles constituted a several contract with each seaman, and a joint libel in admiralty was brought against the proceeds of the vessel by the various seamen, it was held that the matter in dispute for the purposes of appeal was the sum or value of the individual demand of each mariner, without reference to the demands of the others; because none of the others had any interest in his contract or could be aggrieved by the decree with reference to his claim, *and his recovery did not depend on the recovery of the others.*<sup>69</sup> On the other hand, salvage is entire, when claimed against the owner of a ship, for services jointly rendered, and the amount in dispute is the amount due the salvors collectively; and it is of no consequence to the owner of the property saved how the money awarded is apportioned among those earning it.<sup>70</sup>

§ 15. **The Same—Illustrations.**—The rule is thus laid down in a late pronouncement of the Supreme Court upon the subject: “When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demands of each be of the requisite jurisdictional amount; but where several plaintiffs

<sup>67</sup> *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353.

<sup>68</sup> *Gibson v. Shufeldt*, 122 U. S. 27.

<sup>69</sup> *Oliver v. Alexander*, 4 Pet. 143.

<sup>70</sup> *The Connemara*, 103 U. S. 754.

unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.’’<sup>71</sup>

This language was used in a case where, upon the sale of a parcel of land, two notes were given for the balance of the purchase price, secured by the reservation of a vendor’s lien. The notes were assigned to different parties, who upon their remaining unpaid, joined in a suit in equity to enforce the vendor’s lien, brought in a federal court. The aggregate of the two notes was sufficient to support the jurisdiction, but the amount of each singly was below the standard set for the amount in controversy. The lower court dismissed the cause for lack of jurisdiction, and its ruling was reversed by the appellate tribunal. The court said that the controlling object was the enforcement of the vendor’s lien which was a single right or entity in which the plaintiffs had a common and undivided interest, and which neither could enforce in the absence of the other; and while their claims under the notes were separate and distinct, their claims under the vendor’s lien was single and undivided.

In another and much older case, over two hundred occupants of as many separate stalls in a market house, claiming the right under the same statute to indefinite occupancy of their respective stalls so long as they complied with the terms fixed, brought a joint action to restrain the market company from proceeding to let out the stalls at auction to the highest bidders. It was averred that the value of the whole right claimed by the market company was far beyond the jurisdictional amount requisite for appeal. Upon appeal by the market company from a decree against it, the court held that the appeal would be sustained, although the amount in controversy with respect to any one occupant was confessedly insufficient. In other words, the matter in controversy was the total right of the company as against all the plaintiffs; or, conversely expressed, the common and undivided right of all the plaintiffs in the franchise of occupancy.<sup>72</sup>

<sup>71</sup> *Troy Bank v. Whitehead*, 222 U. S. 39.

<sup>72</sup> *Washington Market Co. v. Hoffman*, 101 U. S. 112.

It is laid down in another case that the general principle is that if several persons be joined in a suit in equity, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only and because they form a class of parties whose rights arose out of the same transaction, or have relation to common fund or mass of property sought to be administered, such distinct demands cannot be aggregated together for the purpose of giving jurisdiction, but each must stand or fall by itself alone.<sup>73</sup>

§ 16. **The Same—Illustrations—Creditors' Suits.**—Taking up some of the cases, where the joinder of plaintiffs has been held to involve the aggregation of separate and distinct interests, we will first direct our attention to *Wheless v. St. Louis*, 180 U. S. 379. A number of separate owners of separate lots abutting on the same street brought a bill to enjoin the city and the contractor from proceedings to improve the street, upon the ground that the ordinance and threatened proceedings thereunder were contrary to the rights secured to the complainants by the federal constitution. Special tax bills were to be levied against each lot separately, but the amount to be charged against any one lot would not, while the aggregate amount against all the lots would, confer jurisdiction. It was urged by the complainants, in support of the jurisdiction, that the plaintiffs were jointly interested in a common right, as against the defendant; but the Court, after quoting from *Clay v. Field*, said that it had often been held that the distinct and separate interests of complainants in a suit for relief against assessments could not be united for the purpose of sustaining the jurisdiction. “The matter in dispute within the meaning of the statute is *not the principle involved*, but the pecuniary consequence to the individual party, dependent on the litigation; as, for instance, in this suit, the amount of the as-

<sup>73</sup> *Clay v. Field*, 138 U. S. 464.

assessment levied or which may be levied, as against each of the complainants separately. The rules of law which might subject the complainants to or relieve them from the assessment might be applicable alike to all, but each would be so subjected or relieved in a certain sum, and not the whole amount of the assessment.” In other words, a mere principle of law, under which similar rights or immunities are claimed, cannot constitute the common and undivided right essential to aggregation for purposes of jurisdiction. It may be questioned whether the Washington Market case referred to above can be harmonized with this case.

Where separate judgment creditors, under distinct judgments, joined in a creditors bill to subject a fund of more than the jurisdictional amount for the satisfaction of their judgment, they are asserting separate and distinct interests; and where they each claim less than the statutory requisite, they cannot be permitted to aggregate their claims.

“It is true,” the Court said, “the litigation involves a common fund which exceeds the sum of two thousand dollars (then the jurisdictional limitation) but neither of the judgment creditors has any interest in it exceeding the amount of his judgment.”<sup>74</sup>

Where lessors seeking to forfeit leases, joined in an intervening petition, and the total value of all the leasehold was sufficient, but of each singly was insufficient, to support the jurisdiction on appeal, but there was no integral interest in any parcel, there were as many controversies as there were leaseholds.<sup>75</sup>

In a creditors’ bill, however, where one of several complainants has a claim sufficiently large to invoke the original jurisdiction, there is authority for saying that it is immaterial that the amounts claimed by the others are too small. The complaining creditor sues for the benefit of the other creditors, as well as himself; and as they would be permitted to

<sup>74</sup> *Seaver v. Bigelow*, 5 Wall. 208.

<sup>75</sup> *Henderson v. Carbondale, Etc., Co.*, 140 U. S. 25.

intervene and prove their claims against the fund, it is useless and pure circuitry to strike them out of the bill.<sup>76</sup>

§ 17. **The Same—Defendants.**—The same general principles apply to the aggregation of defendants. We shall call attention first to some of the cases where the joinder was permitted to make up the jurisdictional amount.

Where a suit was brought by complainants, who were the three sons and heirs of an intestate, to set aside the lien of judgments of the same probate court upon real property belonging to the estate and inheritance, which judgments were alleged to have been fraudulently obtained by the defendants, acting in concert and conspiracy together, it was held that the amount in controversy was the aggregate of all the judgments procured by the common fraud; although the judgments were separate in favor of the various several defendants. "It was the fraudulent combination and conspiracy which united the claims and made the aggregate thereof the matter in dispute. By reason of that combination . . . the claims were so tied together to make them, so far as the plaintiff and the relief sought by them are concerned, one claim. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action." In other words, how the proceeds of the *integral fraud* were to be parceled out was immaterial.<sup>77</sup>

So in an admiralty case, the owners of a vessel filed a bill and petition to be permitted to take advantage of the limitation of liability allowed by the laws of the United States, and proffered the appraised value of the vessel in court; and asked the court to restrain the prosecution of about seventeen suits for sums below the jurisdictional amount in each instance, by the administrators of the persons killed by the

<sup>76</sup> Cf. *Handley v. Stutz*, 137 U. S. 366; *Huff v. Bidwell*, 151 Fed. 564.

<sup>77</sup> *McDaniel v. Traylor*, 196 U. S. 415, 212 U. S. 428; Cf. *Ill. Cent. R. R. Co. v. Adams*, 180 U. S. 28.

collision of the vessel with another. It was held that the matter in dispute was the right to surrender the vessel or its value and thereby escape the total liability asserted. The object of the proceedings was to defeat *the full amount of all the claims asserted*, as against anything else save the vessel or its value; and if *that right* (which was the thing in issue) was established as against all the claimants, the owners had nothing to do with the division of the funds thus created among the various claimants.<sup>78</sup>

§ 18. **The Same—Difficulty of Applying Tests.**—Turning to the cases where aggregation of defendants for purposes of jurisdictional amount was held improper, we may observe that in salvage cases (where similar rules as in equity apply) the salvage service is entire; but the goods of each owner are liable only for their own amount of salvage, and are under no common liability for the amounts due from the ship or other portions of the cargo. In such cases there is therefore a separate and distinct controversy for purposes of jurisdictional amount between each owner and the salvors; and not a common and undivided one for which the property is *jointly liable*.<sup>79</sup>

Where a suit in equity was brought to recover distinct auditor's certificates, claimed to belong to the plaintiff, but in the hands of separate defendants who owed to the plaintiff no joint obligation or duty, the amount of the certificates could not be joined for the purpose of sustaining the jurisdiction. There were in fact separate controversies as to each defendant.<sup>80</sup>

In *Gibson v. Shufeldt*, which was a case of appeal, A made a deed of assignment to B, for the purpose of paying C a preferred amount, and the balance to his other creditors. D and E filed a bill in the federal court to have the assignment set aside as fraudulent against creditors. Upon hearing the

<sup>78</sup> *The Mamie*, 105 U. S. 773.

<sup>79</sup> *Stratton v. Jarvis*, 8 Pet. 8; *Spear v. Place*, 11 How. 525; *Shields v. Thomas*, 17 How. 30.

<sup>80</sup> *Ballard Paving Co. v. Mulford*, 100 U. S. 147.



assignment was held to be void, a receiver was appointed, and the fund ordered to be distributed so as to pay D a sum above the jurisdictional amount, E, a sum below that amount, and lesser amounts to various other intervening creditors. B and C appealed to the Supreme Court. The court held that the amount involved was that adjudged to belong to each creditor separately and not the aggregate of the claims, or of the funds to be devoted thereto.<sup>81</sup>

Under the laws of Louisiana, where heirs had taken possession of the property of a succession, without inventory, they hereby subjected themselves to pay each his proportionate share of the debts of the succession. An action was brought by the holder of an unpaid note of the decedent against the heirs who had so taken possession of the assets. It was held that the decrees contemplated were separate, and the interests and liabilities of the heirs were separate and distinct for the purposes of jurisdiction.<sup>82</sup>

A railway company brought an action against the sheriffs and treasurers of several counties, to enjoin them from issuing executions or seizing the property of plaintiff situated in those counties, upon assessments alleged to be unconstitutional and void. The court held that the taxes belonged to each county separately; that had the taxes been paid under protest, separate action must have been maintained to recover them back from each county; and as the amount recoverable from each county would have been different, *no joint judgment could possibly have been rendered*. If a bill for injunction had been filed, a separate bill must have been filed in each county. "It is well settled . . . that when two or more plaintiffs having several interests unite for the convenience of litigation in a single suit, it can only be maintained in the court of original jurisdiction or on appeal in this court, as to those, whose claims exceed the jurisdictional amount; and that when two or more plaintiffs are sued by the same plaintiff in one suit, *the test of jurisdiction is the joint or*

<sup>81</sup> 122 U. S. 27.

<sup>82</sup> Henderson v. Wadsworth, 115 U. S. 264.

*several character of the liability to the plaintiff. . . .* In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendant to the same plaintiff.’’<sup>83</sup>

The same ruling was made in a case where a general exemption against particular taxes was asserted to exist throughout the state by virtue of a corporate charter, and the various sheriffs in different counties were sought to be enjoined.<sup>84</sup> If an injunction proceeding were brought against the state revenue agent, charged with the duty of levying and collecting an integral tax, which was subsequently to be divided in certain proportions among various counties, the question might arise as to whether the whole amount of the tax were not in controversy, it being entirely immaterial to the person wrongfully called upon to pay it, how it was subsequently to be distributed.<sup>85</sup>

Where attachment creditors filed a bill to set aside four separate and distinct chattel mortgages, executed at the same time and under the same circumstances, but to different mortgagees and to secure different and distinct indebtedness, upon the ground that they were executed with the intent to defraud the general creditors, and that they each embraced, to some extent, debts and obligations which were not owed to the several mortgagees, it was held that the interests of the various mortgagees were several. The mortgages were separate, executed to secure distinct indebtednesses which were questioned, and a separate bill would clearly have lain in each case, where the decision might have been different. The defendants did not claim under the same title, and the determination of the cause depended upon the validity of the several mortgages, each of which stood upon its own consideration.<sup>86</sup>

<sup>83</sup> *Walter v. Northeastern Ry. Co.*, 147 U. S. 370.

<sup>84</sup> *Citizens Bank v. Cannon*, 164 U. S. 319; *Cf. Fishback v. Western Union Co.*, 161 U. S. 96.

<sup>85</sup> *Cf. Fishback v. Western Union Co.*, 161 U. S. 96; *Ill. Cent. R. R. Co. v. Adams*, 180 U. S. 28.

<sup>86</sup> *Davis v. Schwartz*, 155 U. S. 631.

Many other interesting instances of the general principle might be cited, but in so summary a treatment as is possible for us they must be foregone. It would be idle to deny that the application of the rules stated to many different states of fact has given rise to difference of opinion, and that many of the cases are not easy to reconcile, especially in the lower federal courts. It is sometimes hard to draw the line between what shall be regarded as a common and undivided right and distinct and separate interests.

**§ 19. Amount in Controversy—Estimation of Subject-Matter.**—Where the suit in equity is to obtain a money decree, the amount claimed in good faith must be the test of equitable jurisdiction as well as at law; and where property is sought to be subjected to the payment of a debt, the amount of the debt and not the value of the property must control.<sup>87</sup> The same rule ought logically to apply where it is sought to prevent the subjection of property to a debt, lien or charge of fixed or plainly estimable value.<sup>88</sup> Such is the rule as to injunction to prevent the levying of specific taxes. So where one seeks to enjoin the levy of an execution, the test is the amount of the execution and not the value of the property.<sup>89</sup>

Where the suit is brought, not to enforce or prevent the enforcement of a burden or charge readily estimable in money, but for the protection of property or contract rights by injunction or similar relief, the jurisdictional test is the value of the right or property sought to be protected or enforced. Thus where a bill is filed by a railroad company to prevent ticket brokers from dealing in non-transferable round trip tickets, contrary to the rights and contracts of the company, the test is not the mere immediate, pecuniary damage resulting from the particular acts complained of, but the value of the

<sup>87</sup> *Farmers' Bank v. Hooff*, 7 Pet. 168; *Gibson v. Shufeldt*, 122 U. S. 27; *Martinez v. Banking Corp.*, 220 U. S. 214.

<sup>88</sup> *Cowell v. City Water Supply Co.*, 121 Fed. 53.

<sup>89</sup> *Ross v. Prentiss*, 3 How. 771; *Turner v. Lumber Co.*, 159 Fed. 926.

business to be protected and the rights of property which the complainants sought to have recognized and enforced.<sup>90</sup>

In a bill in equity by an incorporated exchange to restrain a defendant from using without right or license the quotations furnished by it to its licensees, the amount in controversy is the right to the quotations, and the value of that unimpaired right to the exchange determines the jurisdiction. It is not the sum that complainant might recover in an action at law for the damage already sustained; nor is such a complainant required to wait until his loss has reached demonstrably the jurisdictional amount.<sup>91</sup>

Where the injunction is sought to protect the right to carry on interstate commerce without being subject to constant orders of a state corporation commission, directly burdening interstate commerce, the value of that right is the amount in controversy, although the immediate origin of the dispute is a demurrage charge of only \$146.00.<sup>92</sup>

Thus where an injunction is sought by an educational institution to protect its perpetual exemption from state taxation, the amount in controversy is not to be measured by the instant tax, but by the value of the contract, which was the matter in dispute.<sup>93</sup>

Where a suit is brought to obtain a decree vesting the title to specific real or personal property, the amount in controversy is the value of such property, the same rule applying as at law. In a suit for specific performance of a contract to convey land the test is the value of the land;<sup>94</sup> and the same rule would apply to suits to quiet title to property or remove clouds therefrom, provided the questions involved the whole title, and not merely some estimable charge or claim.<sup>95</sup> The

<sup>90</sup> *Bitterman v. L. & N. R. R. Co.*, 207 U. S. 205.

<sup>91</sup> *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322; *Board of Trade v. Cella*, 145 Fed. 28.

<sup>92</sup> *McNeill v. Southern Ry. Co.*, 202 U. S. 543.

<sup>93</sup> *Berryman v. Whitman College*, 222 U. S. 1. c. 345.

<sup>94</sup> *Stinson v. Dousman*, 20 How. 461; *Kirby v. American Soda, Etc., Co.*, 194 U. S. 141; *Elgin v. Marshall*, 106 U. S. 578.

<sup>95</sup> Cf. *Smith v. Adams*, 130 U. S. 1. c. 175; *Carne v. Russ*, 152 U. S. 250; *Woodside v. Ciceroni*, 93 Fed. 4.

value in dispute, in an action to recover an office, may be measured by the salary of the office.<sup>97</sup>

§ 20. **Amount in Controversy — Things Inestimable — Amount How Shown — Fictitious Valuation — Change in Value.**—It must be manifest that certain things are of a nature not to be appreciable in money value. Thus the inestimable privilege of civil liberty, the value of the custody of a child, or of a severance of the marriage relation, are too imponderable to be weighed and calculated in the ordinary method of business transactions. So the gain or loss to a county by reason of the removal of a county seat is hardly susceptible of pecuniary estimation.<sup>98</sup>

A jurisdiction over such matters, in so far as dependent upon the amount in controversy, must be declined, in order to protect the limited jurisdiction of the federal courts. In pursuance of the same policy, the value of the matter in controversy is required to appear somewhere of record in the cause. Usually, of course, it will be set forth in the bill or declaration, and it is the duty of the court at all stages to apply the statute as to dismissal, whenever there is a legal certainty upon the record that the requisite amount is not involved.<sup>99</sup>

It is sufficient, however, if it appear by any portion of the record; and it is even held, under particular circumstances, that it may be shown by affidavit.<sup>100</sup>

The statement of the amount involved in the declaration or bill cannot always be taken at its face value. Where the facts stated do not support such an averment, and the plaintiff in legal effect asserts a claim which he plainly cannot,

<sup>97</sup> *Smith v. Adams, supra*; *Smith v. Whitney*, 116 U. S. 167.

<sup>98</sup> Cf. *Kurtz v. Moffitt*, 115 U. S. 487; *Smith v. Adams*, 130 U. S. 167; *Barry v. Mercein*, 5 How. 103; *De la Rama v. De la Rama*, 201 U. S. 303.

<sup>99</sup> *Wetmore v. Rymer*, 169 U. S. 115; *Put-in-Bay Waterworks v. Ryan*, 181 U. S. 1. c. 430; *Barry v. Edmunds*, 116 U. S. 550; *Fishback v. Western Union Co.*, 161 U. S. 1. c. 100.

<sup>100</sup> *Red River, Etc., Co., v. Needham*, 137 U. S. 632; *Carr v. Fife*, 156 U. S. 494; *Robinson v. Brick Co.*, 127 Fed. 804.

under the existing substantive law, be permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction. No mere pretense, not asserted in apparent good faith and justifiable in legal theory, will suffice to confer the jurisdiction.<sup>101</sup>

The court cannot, however, arbitrarily reject a claim as being plainly for an excessive amount, where a recovery to that extent is within legal possibility. Thus the amount of damages which plaintiff shall recover, in an action for damages for the rejection of his vote, is a matter peculiarly appropriate for the verdict of a jury; and where the damages are laid at the jurisdictional sum, no feeling of the court on that subject can justify its holding that the amount really in controversy is much less.<sup>102</sup>

Nor does the rule prevent the vesting of jurisdiction by combining a claim for punitive as well as actual damages, where such damages may be recovered. The jurisdiction exists from the beginning, though far less than the amount claimed may be actually recovered,<sup>103</sup> but the court always has power to protect itself against fraudulent or colorable allegations as to jurisdiction.<sup>104</sup>

Jurisdiction, once acquired, is not lost by any subsequent change in the value of the controversy.<sup>105</sup>

**§ 21. Amount Must be Directly Involved—Joining Claims.**—The amount in dispute must further be involved in the particular action, and no account can be taken of remote or collateral consequences. A contingent loss that either of the parties may sustain from the probative effect of the judgment, in subsequent proceedings, cannot be considered, however certain the occurrence of such loss.<sup>106</sup> Where the

<sup>101</sup> *North American, Etc., Co. v. Morrison*, 178 U. S. 262; *Schunk v. Moline Co.*, 147 U. S. 500; *Bowman v. Chicago, Etc., R. R. Co.*, 115 U. S. 611; *Vance v. Vandercook Co.*, 170 U. S. 468.

<sup>102</sup> *Wiley v. Sinkler*, 179 U. S. 58.

<sup>103</sup> *Scott v. Donald*, 165 U. S. 58.

<sup>104</sup> *Smithers v. Smith*, 204 U. S. 632.

<sup>105</sup> *Kirby v. American Soda Co.*, 194 U. S. 141.

<sup>106</sup> *New England Mtge. Co. v. Gay*, 145 U. S. 123; *Clay Center v. Farmers' Trust Co.*, 145 U. S. 224; *Wallach v. Rudolph*, 217 U. S. 561.

§ 21 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

taxes for certain years are sought to be enjoined, the effect of the decision on future taxes, not yet levied, cannot be considered in arriving at the amount in dispute.<sup>107</sup>

The fact that a county may gain or lose a building site by the determination of the validity or invalidity of an election for removal of a county seat is not a direct, usual or necessary consequence to be taken into account, in determining the amount involved in an action to try the validity of such election, but is purely collateral.<sup>108</sup> It does not necessarily destroy the jurisdiction that a defense is apparent to all or part of the claim asserted, for the defense may not be made, nor is it necessary that all the claim sued for in good faith should be actually due at the time of the suit, at least where, under adopted state practice, action may be brought on such demands.<sup>109</sup>

Where a single or joint plaintiff brings suits in the same declaration or bill to recover upon a number of instruments or claims due to the individual or collective plaintiff in the same capacity, from the individual or collective defendant, the total amount may be taken as the measure of jurisdiction; and this is true even though in an action of law, the declaration be divided into counts, each of which taken singly is insufficient. It is understood that the joinder here spoken of must be permissible under the general rules of pleading.<sup>110</sup> But where demands or claims are assigned to the plaintiff for the purpose of collection only, without consideration and remain the property of the respective assignors who are paying pro rata the expenses of litigation, there can be no joinder for purposes of jurisdiction.<sup>111</sup>

<sup>107</sup> *Holt v. Indiana Mfg. Co.*, 176 U. S. 68.

<sup>108</sup> *Smith v. Adams*, 130 U. S. 167.

<sup>109</sup> *Schunk v. Moline Co.*, 147 U. S. 500; *Smithers v. Smith*, 204 U. S. 632.

<sup>110</sup> *Green County v. Thomas*, 211 U. S. 598; *Armstrong v. Ettlesohn*, 36 Fed. 209; *Thompson v. Southern R. Co.*, 116 Fed. 890; *Hill v. Garden*, 45 Fed. l. c. 278; *Spokane Valley Co. v. Kootenai County*, 199 Fed. 481; *Marshall v. Holmes*, 141 U. S. 589.

<sup>111</sup> *Woodside v. Beckham*, 216 U. S. 117; *Waite v. Santa Cruz*, 184 U. S. 302.

## CHAPTER V.

### DISTRICT COURT—REMOVAL OF CAUSES.

- § 1. Nature of Removal Proceedings—Instances Cited.
- 2. Removal of Causes—Subordinate Instances.
- 3. Must Be "Suit."
- 4. Suit Must Have Separate Identity As Such.
- 5. Involves Judicial Proceeding—Not Administrative.
- 6. Must Be of Civil Nature.
- 7. Must Be Within Original Jurisdiction—State Cannot Defeat By Imposing Peculiar Methods.
- 8. Amount in Removal Cases—Counter Claims—Change.
- 9. Venue in Removal—Waiver.
- 10. Removal—Federal Question—Opening Pleading—Joining Federal Corporation—Employers' Liability.
- 11. Real and Nominal Parties—Initial and Continuous Diversity Required—Aliens.
- 12. Realignment of Parties—Necessary Parties—False Averment of Citizenship.
- 13. Removal of Causes—Joinder of Applicants—Substituted Parties.
- 14. Separable Controversies—Aliens—Determined By Face of Complaint—Fraud.
- 15. Charge of Joint Liability—General Tests for Separability—State Laws Generally Applied.
- 16. How Fraudulent Joinder Attacked—Trial—Motive.
- 17. Removal of Separable Controversy Removes Whole Case.

§ 1. **Nature of Removal Proceedings—Instances Stated.**  
—We come next to the jurisdiction of the District Court arising from the removal thereto of causes originally begun in the state courts. The right of removal is purely statutory; there being no mention thereof in the constitution.<sup>1</sup> It is probably to be regarded as in the nature of an original jurisdiction.<sup>2</sup>

It is designed (1) to afford to a *defendant* a speedy means of authoritatively establishing his federal rights or immuni-

<sup>1</sup> *Anaconda, Etc., Co. v. Butte, Etc., Co.*, 200 Fed. 808; *Little York, Etc., Co. v. Keyes*, 96 U. S. 199.

<sup>2</sup> *R. R. Co. v. Whitton*, 13 Wall. 270.



§ 1 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ties, or of defeating those claimed by his adversary; or (2) to obtain an impartial hearing for *defendants* of diverse citizenship, or for *persons* claiming land under grants from different states, by the transfer of the cause to a federal arbiter.

To the first class, involving the assertion or denial of federal rights or immunities, belong the following cases:

(a) Any suit of a civil nature, at law or in equity, arising under the constitution, laws or treaties of the United States, of which the District Court is given original jurisdiction.<sup>3</sup>

(b) Any civil suit or criminal prosecution (1) against any person who is denied or cannot enforce in the judicial tribunals of the state (or in the part of the state where the proceeding is pending) any right secured to him *by any law providing for the equal civil rights* of citizens of the United States or of all persons within the jurisdiction of the United States; or (2) against any officer, civil or military, or other person for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from *any law providing for equal rights as aforesaid*; or (3) against any officer, civil or military, or other person, for refusing to do any act upon the ground that it would be inconsistent with *such law*.<sup>4</sup>

(c) Any civil suit or criminal prosecution (1) against any officer appointed under or acting by authority of any *revenue law* of the United States (or any person acting under or by authority of such officer) on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law; or (2) against any person who holds property or estate by title derived from such officer, and involving the validity of any such *revenue law*; or (3) against any *officer of the courts* of the United States, for or on account of any act done under color of his office or in the performance of his duties as such officer; or (4)

<sup>3</sup> J. C., Sec. 28.

<sup>4</sup> J. C., Sec. 31.

against any person for or on account of anything done by him while an *officer* of either house of Congress in the discharge of his official duty, in executing any order of such house.<sup>5</sup>

To the second class, involving defendants of diverse citizenship, or persons claiming land under grant from different states, belong the following:

(d) Any suit of a civil nature, at law or in equity (other than those arising under the constitution, laws or treaties of the United States above mentioned), of which the District Courts are given original jurisdiction. This practically means those cases in which the jurisdiction is vested by reason of diversity of citizenship.<sup>6</sup>

(e) Any personal action brought by an alien, in a state court, against a citizen and resident of another state who is, or at the time of the accrual of the action was, a civil officer of the United States, and who has been served with process within the jurisdiction of the state court where the action is pending.<sup>7</sup>

(f) Any action in which is concerned the title to land and the matter in dispute exceeds the sum or value of three thousand dollars (exclusive of interest and costs) in which it is made to appear that the parties (being citizens of the same state) rely upon adverse rights or titles to the land under grant from different states.<sup>8</sup>

§ 2. **Removal of Causes—Subordinate Instances.**—There are two subordinate instances of removal, referable to diversity of citizenship. They are (dd) the removal of a *separable controversy* and (ddd) removal for *prejudice* or local *influence*.

(dd) Whenever, in any suit involving a federal question or diversity of citizenship, and sufficient amount, to come within the jurisdiction of the District Court, there is a con-

<sup>5</sup> J. C., Sec. 33; Act of Aug. 23, 1916.

<sup>6</sup> J. C., Sec. 28.

<sup>7</sup> J. C., Sec. 34.

<sup>8</sup> J. C., Sec. 30.

§ 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

troverſy that is wholly between citizens of different ſtates and fully determinable between them, then one or more of the defendants actually intereſted in ſuch controverſy may remove the ſuit into the Diſtrict Court for the proper diſtrict.<sup>9</sup>

(ddd) Whenever, in a ſuit pending in a ſtate court, there is a controverſy between a citizen of the ſtate in which the ſuit is brought and a citizen of another ſtate, any defendant being a citizen of ſuch other ſtate, may remove the ſuit, upon ſhowing to the Diſtrict Court of the United States, that on account of prejudice or local influence he will not be able to obtain juſtice in that ſtate court or in any other ſtate court to which he might, under the laws of the ſtate, remove the cauſe, on account of ſuch prejudice or local influence.<sup>10</sup>

§ 3. **Must be "Suit."**—Taking up the foregoing inſtances, we direct our attention firſt to the language of the firſt part of Section 28 of the Judicial Code.

(a) "Any ſuit of a civil nature, at law or in equity, ariſing under the conſtitution or laws of the United States, or treaties made or which ſhall be made, under their authority, of which the Diſtrict Courts are given original juriſdiction by this title, which may be pending or which may hereafter be brought, in any ſtate court, may be removed by the defendant or defendants therein to the Diſtrict Court of the United States for the proper diſtrict. (d) Any other ſuit of a civil nature, at law or in equity of which the Diſtrict Courts of the United States are given juriſdiction by this title, and which are now pending or may hereafter be brought in any ſtate court, may be removed into the diſtrict court of the United States for the proper diſtrict by the defendant or defendants therein being non-reſident of that ſtate."

Because much of what we ſhall ſay applies to both (a) and (d), I have ſet out both clauses of the ſection as they appear therein.

The firſt requirement is that there ſhould be a ſuit. This term is of a very comprehensive import and means the proſ-

<sup>9</sup> J. C., Sec. 28.

<sup>10</sup> *Ibid.*

ecution of a claim or demand, enforceable by law, in a court of justice.<sup>11</sup>

In itself the word may be regarded as synonymous with case, and includes both sides of the controversy, the defense as well as the prosecution.<sup>12</sup> In a legal sense, *action*, *suit* and *cause* are declared to be convertible terms.<sup>13</sup>

It is manifest that the laws of the state, which create rights and mould the structure of the proceeding for their recognition or establishment, must, in some measure, determine the existence of a suit, under particular circumstances.

**§ 4. Suit Must Have Separate Identity as Such.**—There must be a separate identity as a judicial proceeding. A proceeding in the nature of a writ of error *coram nobis*, or of a motion to set aside a judgment for irregularity, is not a suit in itself, but a mere supplementary or ancillary proceeding incident to the original suit.<sup>14</sup> On the other hand, a bill in equity to set aside and annul a judgment for fraud in its procurement asserts an independent cause of action, being in effect a new case for the trial of matters which could not have been considered in the former case.<sup>15</sup>

A cross demand or counterclaim set up by the defendant in the state court, by way of defense and for affirmative relief against the plaintiff's claim, is not an independent suit which is removable by the plaintiff.<sup>16</sup>

How a pure counterclaim, having no essential connection with the matter sought to be litigated in the bill or declaration, and requiring defensive pleading, ought to be regarded,

<sup>11</sup> *Weston v. Charleston*, 2 Pet. 449; *New Orleans, Etc., R. R. Co. v. Mississippi*, 102 U. S. 135; dissenting opinion; *Cohens v. Virginia*, 6 Wheat. 264; *Upshur County v. Rich*, 138 U. S. 467.

<sup>12</sup> *New Orleans, Etc., R. R. Co. v. Mississippi*, 102 U. S. 135; *Tennessee v. Union, Etc., Bank*, 152 U. S. 1. c. 468.

<sup>13</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>14</sup> *Barrow v. Hunton*, 99 U. S. 80.

<sup>15</sup> *Bondurant v. Watson*, 103 U. S. 281; *Marshall v. Holmes*, 141 U. S. 589.

<sup>16</sup> *West v. Aurora*, 6 Wall. 139.

has been variously decided; but the better notion is, that the plaintiff is not a defendant in such proceedings.<sup>17</sup>

An intervention proceeding asserting title to property in the hands of the sheriff, seized as the property of the defendant to the original proceeding, is not a suit of such an independent character as to justify its removal from the state to the federal court.<sup>18</sup>

A *scire facias* upon a recognizance or for other similar purposes might be regarded as an original suit for the purposes of removal; while a *scire facias* to revive judgment is regarded as a mere continuation of the cause.<sup>19</sup>

**§ 5. Involves Judicial Proceeding—Not Administrative.**—The term *suit* further involves the notion of a judicial, as distinguished from an administrative or executive proceeding.

This is stressed, with respect to removal cases, by the provision for removal from a *court*.

A proceeding, not in a court of justice, but carried on by executive officers, to value property for the assessment and distribution of taxes against it, is purely administrative in character; and its nature is not changed by an appeal to a body having no judicial powers, such as a board of assessors or commissioners; although such an appeal may for the first time become a suit when taken to a tribunal having power to determine questions of law and fact, and the adverse sides to the controversy are represented by parties litigant.<sup>20</sup>

The same distinction applies between a claim against a county presented in the first instance to a county court sitting as an administrative body, and an appeal prosecuted from their action in the premises to the Circuit Court for

<sup>17</sup> Price v. Ellis, 129 Fed. 482; Glover v. Cooke, 222 Fed. 531; Carson v. Holtzclaw, 39 Fed. 578; Waco Hdwre. Co. v. Michigan, Etc., Co., 91 Fed. 289; Wolcott v. Watson, 46 Fed. 529; Indian, Etc., Co. v. Asheville, Etc., Co., 135 Fed. 837; Ill. Central R. R. v. Waller, 164 Fed. 358.

<sup>18</sup> Bank v. Turnbull, 16 Wall. 190.

<sup>19</sup> U. S. v. Payne, 147 U. S. 687; *sed quaere*.

<sup>20</sup> Upshur County v. Rich, 138 U. S. 467.

the county, triable and determinable therein as an action *inter partes*.<sup>21</sup>

A proceeding to procure a license to pursue the occupation of salmon canner, although sought under the provisions of statute in the District Court, is administrative and not judicial in character and does not constitute a suit.<sup>22</sup>

The probate of a will is not a suit, but is regarded as an administrative proceeding, essential to the *prima facie* validity of the testament. In so far as regarded as being in the nature of a proceeding *in rem*, it involves no distinctive parties, and hence jurisdiction could not vest upon the ground of diversity of citizenship; and the law of wills involves no question arising under the constitution or laws of the United States.

The state always provides for the proof of execution in a state tribunal, and no rights under the instrument can exist or constitute the basis of a controversy, capable of contest in the courts, until preliminary probate has been made.<sup>23</sup>

Where, however, under the laws of the state, customary or statutory, suits to cancel a will as a muniment of title, or for the contestation of the validity of a will or its probate, are permitted, they may be brought in or removed to the federal courts; provided that the action under the laws of the state constitutes a controversy, between adverse parties, and the other conditions of federal justiciability are present.<sup>24</sup>

When the proceeding under the state laws is in effect to procure a revocation of the probate, and is merely ancillary and supplemental to the main probate proceeding, there can, of course, be no removal.<sup>25</sup> Proceedings for the condemna-

<sup>21</sup> *Ibid.* Delaware County v. Diebold Safe Co., 133 U. S. 473.

<sup>22</sup> Pacific Whaling Co. v. U. S., 187 U. S. 447.

<sup>23</sup> Ellis v. Davis, 109 U. S. 485; Byers v. McAuley, 149 U. S. 608; O'Callaghan v. O'Brien, 199 U. S. 89; Gaines v. Fuentes, 92 U. S. 10.

<sup>24</sup> Gaines v. Fuentes, 92 U. S. 10; Ellis v. Davis, 109 U. S. 485; O'Callaghan v. O'Brien, 199 U. S. 89; Cf. Williams v. Crabb, 117 Fed. 193.

<sup>25</sup> O'Callaghan v. O'Brien, 199 U. S. 89.

tion of land by action in the courts, whether originally brought in or removed thereto, are suits for purposes of removal.<sup>26</sup>

§ 6. **Must be of Civil Nature.** — In the next place the suit must be of a civil nature. The word civil is designed to leave in the hands of the state authorities the infliction of punishment for offenses against the laws and sovereignty of that state.

In cases that do not involve the vindication of federal rights, which form an ingredient in the case, the federal courts would have no right, even as a matter of general law, to enforce the penal laws of another state or of another country.<sup>27</sup>

In determining whether the proceeding is civil or penal, its real and essential nature must be regarded, and not the mere outward form it may be made to assume.<sup>28</sup>

Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal or penal in their nature.<sup>29</sup>

An action upon a criminal recognizance to preserve the peace, against the defendant therein, is to be regarded as a proceeding for the recovery of a penalty, and therefore not removable from the state court.<sup>30</sup>

Habeas corpus, to compel the release from unlawful imprisonment of a person prosecuted for crime, is a civil proceeding, distinct from the criminal prosecution, to recover and vindicate the right of civil liberty; although as heretofore suggested, no pecuniary value can be assigned to such a right.<sup>31</sup>

<sup>26</sup> Kohl v. U. S., 91 U. S. 367; Searl v. School District, 124 U. S. 197; Miss., Etc., Co. v. Patterson, 98 U. S. 403; Union Pac. R. Co. v. Myers, 115 U. S. 1; Madisonville Traction Co. v. St. Bernard Co., 196 U. S. 239; see dissenting opinion in last case.

<sup>27</sup> Wisconsin v. Pelican Insurance Co., 127 U. S. 265.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ex parte* Tom Tong, 108 U. S. 556.

<sup>30</sup> *Respublica v. Cobbet*, 3 Dall. 467; *Cf. U. S. v. Payne*, 147 U. S. 687.

<sup>31</sup> *Ex parte* Tom Tong, 108 U. S. 556.

Where, under the statutes of a state, the proceeding in *quo warranto* is regarded as a mere civil action, it will be so treated in the federal courts.<sup>32</sup>

The test whether a law conferring the right of action is pénal, is whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to the person injured.<sup>33</sup>

The essential nature of a cause of action as civil or penal is not changed, because the claim has at some time been reduced to the form of a judgment and the instant action is designed to enforce that judgment.<sup>34</sup>

**§ 7. Must be Within Original Jurisdiction—State Cannot Defeat by Imposing Peculiar Methods.**—Another limitation is that the suit should be one “of which the district courts are given jurisdiction by this title.”

The title referred to is that headed “The Judiciary,” and comprehends the Judicial Code. It is asserted by the Special Joint Committee which prepared and submitted the Judicial Code that the use of the words “by this title” were not intended to change the meaning of the act of 1887-8, which used the words “by the preceding section.”<sup>35</sup>

That preceding section provided for jurisdiction of all suits of a civil nature, at law or in equity, (1) arising under the constitution, laws or treaties of the United States, or (2) in which there should be a controversy between citizens of different states, or between citizens of a state and foreign states, citizens or subjects, subject to the limitation of minimum amount; as well as of controversies between citizens of the same state, claiming lands under grants from different states, or in which the United States were plaintiffs or petitioners. It was therein further provided, that where the jurisdiction was founded only on diversity, the venue should be the residence of either the plaintiff or defendant, and other-

<sup>32</sup> *Ames v. Kansas*, 111 U. S. 449.

<sup>33</sup> *Huntington v. Attrill*, 146 U. S. 657.

<sup>34</sup> *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

<sup>35</sup> See Report No. 388, part 1, p. 19.



wise the residence of the defendant; and the provision against founding jurisdiction by assignment, with which we are familiar, was further set forth therein.<sup>36</sup>

This sweeping limitation was originally contained in the Judiciary Act of 1789. Under the liberalizing policy for removals adopted during reconstruction, it was done away with; but restored by the act of 1887-1888, which has been carried forward (with an increase of the jurisdictional amount) into the Judicial Code.<sup>37</sup>

Under this limitation, it is the general rule that those suits only are removable which could have been brought in the particular court by original process.<sup>38</sup>

In spite of this limitation, we find in the federal courts a class of cases which are treated as removable, although their initiation or beginning is, by state statute, conditioned upon preliminary proceedings in certain designated state tribunals. These are usually tax proceedings, condemnation cases, probate proceedings or of similar character.<sup>39</sup>

These cases are to be justified on the theory that where a proceeding has actually become a suit within the true meaning of that word, neither the decision nor the law of a state can curtail the jurisdiction vested by the laws of the United States in the federal courts.

It makes no difference in this principle that the state has undertaken to directly declare that a particular proceeding can only be maintained in a state court, or has indirectly

<sup>36</sup> Cf. J. C., Sec. 24, cl. 1.

<sup>37</sup> *Cochran v. Montgomery County*, 199 U. S. l. c. 269.

<sup>38</sup> *Ibid.* *Tennessee v. Union, Etc., Bank*, 152 U. S. 454; *Mexican Nat. Ry. Co. v. Davidson*, 157 U. S. 201; *Ex parte Wisner*, 203 U. S. 449; *Western Union, Etc., Co. v. Illinois R. R. Co.*, 208 Fed. 266; *Madisonville Traction Co. v. St. Bernard Co.*, 196 U. S. l. c. 245.

<sup>39</sup> Cf. *Upshur County v. Rich*, 138 U. S. 467; *Barber Asphalt Co. v. Morris*, 132 Fed. l. c. 949; *In re Stutsman*, 88 Fed. 337; *Waha-Lewiston Land Co. v. Lewiston Co.*, 158 Fed. 137; *Terre Haute v. Evansville Ry. Co.*, 106 Fed. 545; *Union Terminal Ry. v. Chicago, Etc., Co.*, 119 Fed. 209.

attempted to bring about that result, by providing for a peculiar mode of its initiation.<sup>40</sup>

Whether, however, when the proceeding is prerogative in character and constitutes a direct assertion of state sovereignty, it ought to be regarded as a *suit* originally maintainable in the federal courts, beyond the power of the state legislature to provide otherwise has been justly doubted.<sup>41</sup>

There are certain statutory limitations to the removal of particular classes of cases which might have been originally brought in the federal courts. Thus, a proviso as to amount in controversy, in cases to recover damages for loss or injury to freight, is imposed by the amendment to Section 28 of the Judicial Code, enacted Jan. 20, 1914.

**§ 8. Amount in Removal Cases—Counterclaims—Change.**—The amount in controversy, as being sufficient to justify original justiciation, has been heretofore discussed with some fullness, and the same general rules are applicable here. The amount in controversy may be shown either by the prior record in the state court, or (at any rate, if that be doubtful or silent) by the petition for removal.<sup>42</sup>

It is further a question, whether the amount in controversy must be sufficient both at the time of the *bringing* of the suit in the state court, and of the completed application for removal.

I am clear that, as a general rule, the amount in controversy is that manifested with apparent legal right at the

<sup>40</sup> Cf. *Clark v. Bever*, 139 U. S. 96; *Barber Asphalt Co. v. Morris*, 132 Fed. l. c. 949.

<sup>41</sup> *Madisonville Traction Co. v. St. Bernard, Etc., Co.*, 196 U. S. 236; dissenting opinion.

<sup>42</sup> *Banigan v. Worcester*, 30 Fed. 392; *Langdon v. Coal Co.*, 41 Fed. 609; *Postal, Etc., Co. v. Southern Ry. Co.*, 88 Fed. 803; *South Dakota Ry. Co. v. Chicago, Etc., Co.*, 141 Fed. 578; *Southern Cash Register Co. v. Register Co.*, 143 Fed. 659; *Railway Telegraphers v. L. & N. R. R. Co.*, 148 Fed. 437; Cf. *Little York, Etc., Co. v. Keyes*, 96 U. S. 199.

time the removal is properly sought.<sup>43</sup> The question, however, has not been without dispute, and earlier cases, not in terms overruled, have held the contrary.<sup>44</sup>

The basis of the cases last cited is that the Supreme Court of the United States has consistently held that where diverse citizenship has been relied upon as a ground of removal, that diversity as between the parties to the removal proceeding must exist both at the time of the bringing of the original suit and at the time removal is sought.<sup>45</sup>

This construction is confessed by the Supreme Court not to be free from doubt, but was adopted upon the theory that it could not have been intended to so change the previous law as to permit a party to divest state jurisdiction, once rightfully vested, by a voluntary change of citizenship.<sup>46</sup>

This analogy cannot be pressed to its logical conclusion, without serious interference with many cases and the present accepted practice in the federal courts. A right to remove, upon the ground of federal question, may arise for the first time from an amendment of the complaint or petition, though not set up in the former pleading;<sup>47</sup> and there could be no federal question, *ab initio*, or until it was actually raised. Furthermore, it seems to be settled that a party whose presence is an obstacle to removal on the ground of diversity may

<sup>43</sup> See *Yarde v. B. & O. R. Co.*, 57 Fed. 913; *Huskins v. Cincinnati, Etc., R. Co.*, 37 Fed. 504; *Price v. Ellis*, 129 Fed. 482; *Hayward v. Nordberg*, 85 Fed. 4; *Riggs v. Clark*, 71 Fed. 560; *Johnson v. Computing Scale Co.*, 139 Fed. 1. c. 344; *Clarkson v. Manson*, 4 Fed. 257; Cf. *Northern Pac. Co. v. Austin*, 135 U. S. 315.

<sup>44</sup> *Carrick v. Landmann*, 20 Fed. 209; *La Montagne v. Harvey Lumber Co.*, 44 Fed. 645; *Strassberger v. Beecher*, 44 Fed. 209; *Back v. Sierra, Etc., Co.*, 46 Fed. 673; *Manufacturing Co. v. Broderick*, 6 Fed. 654.

<sup>45</sup> *Gibson v. Bruce*, 108 U. S. 561; *Akers v. Akers*, 117 U. S. 197; *Stevens v. Nichols*, 130 U. S. 230; *Kinney v. Columbia Savings, Etc., Co.*, 191 U. S. 78.

<sup>46</sup> *Gibson v. Bruce*, *supra*.

<sup>47</sup> *Bailey v. Mosher*, 95 Fed. 223; *Guarantee Co. v. Hanway*, 104 Fed. 369; *Myrtle v. Nevada, Etc., Ry. Co.*, 137 Fed. 193; *Jones v. Mosher*, 107 Fed. 561.

be dropped from the cause by amendment or voluntary dismissal, and it then for the first time becomes removable between the remaining parties.<sup>48</sup>

And it is the general holding, that at any time before the jurisdiction of the federal court has actually attached by the completion of the requisite removal proceedings, the plaintiff may, where the nature of the case permits, defeat the right of removal by reducing his claim below the jurisdictional amount.<sup>49</sup>

As to whether a counterclaim may be added, the authorities are not settled; I think it cannot.<sup>50</sup>

No change in the amount, by reduction, dismissal or otherwise, can divest the jurisdiction of the federal court, once invoked in good faith and lawfully acquired.<sup>51</sup>

**§ 9. Venue in Removal—Waiver.**—We have seen that where the jurisdiction depends, wholly or in part, upon the involution of a federal question, the defendant must be sued within the district whereof he is an inhabitant; and where it depends upon diversity of citizenship alone, the suit may be brought either in the residence of the plaintiff or the defendant. We have also noted that this privilege may be waived and that it concerns the person and in no wise affects the jurisdiction over the subject matter.

It is now settled, after much contrariety of decision among the lower federal courts that a citizen of a state who is sued in a state court, in a case involving diversity of citizenship or a federal question, in a district outside that of the residence of the parties, may and does consent to the jurisdiction

<sup>48</sup> *Powers v. C. & O. R. Co.*, 169 U. S. 92; *Robinson v. Parker-Washington Co.*, 170 Fed. 850; *Bagenas v. Southern Pac. Co.*, 180 Fed. 887; *Berry v. St. Louis, Etc., R. Co.*, 118 Fed. 911.

<sup>49</sup> *Anderson v. Western Union Co.*, 218 Fed. 78; *Waite v. Phoenix Ins. Co.*, 62 Fed. 769; *Maine v. Gilman*, 11 Fed. 214.

<sup>50</sup> *Waco, Etc., Co. v. Michigan, Etc., Co.*, 91 Fed. 289; *McKown v. Coal Co.*, 105 Fed. 657; *Lee v. Insurance Co.*, 74 Fed. 424; *LaMontagne v. Harvey*, 44 Fed. 645; *Bennett v. DeVine*, 45 Fed. 705; *Price v. Ellis*, 129 Fed. 482; Cf. also *Kirby v. American Soda Co.*, 194 U. S. 141.

<sup>51</sup> *Kirby v. American Soda Co.*, 194 U. S. 141.

of the federal court by filing his petition for removal; that the plaintiff may thereupon, if he desires, file his application to remand the cause; and that if he does not do so, but appears without objection in the federal court and submits himself to its jurisdiction, the court may validly proceed with the cause.<sup>52</sup>

§ 10. **Removal—Federal Question—Opening Pleading—Joining Federal Corporation—Employers' Liability.**—Taking up more especially the case where the removal is sought upon the ground of a federal question, we observe that the suit must *arise* under the constitution, law or treaties of the United States. In the interpretation of this provision, the same rule applies as to original proceedings, viz., that the federal question, which supports the jurisdiction, must appear by appropriate pleading, at the outset, from the bill or declaration of the party bringing the suit.<sup>53</sup> If it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent portions of the record.<sup>54</sup>

The reason for this rule is, that the courts have undertaken in accordance with the restrictive policy manifested by congressional legislation, to declare that the jurisdiction by removal extends only to such cases as could be originally maintained in the federal courts; and as they would justiciate a cause as arising under the constitution, law or treaties, originally brought in the federal courts, only when that arisal was plainly and logically shown by the opening pleading, so they ought to apply the same limitation to the jurisdiction by removal.<sup>55</sup>

<sup>52</sup> *Ex parte Wisner*; 203 U. S. 449; *In re Moore*, 209 U. S. 490; *Kreigh v. Westinghouse*, 214 U. S. 249.

<sup>53</sup> *Tennessee v. Union, Etc., Bank*, 152 U. S. 454.

<sup>54</sup> *Ibid.* *Chappell v. Waterworth*, 155 U. S. 102; *Walker v. Collins*, 167 U. S. 57; *Postal Tel., Etc., Co. v. Alabama*, 155 U. S. 482; *Houston & Tex. R. R. Co. v. Texas*, 177 U. S. 66; *Gableman v. Peoria, Etc., Co.*, 179 U. S. 335; *Minnesota v. Northern Sec. Co.*, 194 U. S. 48.

<sup>55</sup> *Tennessee v. Union, Etc., Bank*, 152 U. S. 454.

It seems, however, that where a suit is brought against a federal corporation, the court will take judicial notice of the federal law conferring the charter. This being true, no false or mistaken averment of the plaintiff, with the purpose or apparent result of avoiding removal, could override the law which must be read into and as a part of the petition or complaint.<sup>56</sup>

Where an action is brought asserting a joint liability, against a federal corporation and other defendants, it is as to the other defendant as well as to the corporation, a suit arising under the laws of the United States; and the federal character permeates the case.<sup>57</sup>

The same rules apply to the real and substantial character of the federal controversy, as in original proceedings; and the court is under a similar duty to remand where such a controversy does not really and substantially exist.<sup>58</sup>

Where the ground of the removal is the existence of a federal question, citizenship is immaterial, and non-residence is not required; the statute conferring the right simply upon the *defendants*.

The requirement of non-residence, as may have been observed, is also omitted from the statute dealing with the removal of a separable controversy; the significance of which has been disputed. The better rule is that residents may not remove a separable controversy.<sup>59</sup>

There is one class of cases involving a federal question which is barred by the statute from removal. These arise

<sup>56</sup> *Tex. & Pac. Ry. Co. v. Cody*, 166 U. S. 606; *Tex. & Pac. Ry. Co. v. Barrett*, 166 U. S. 617; *Heffelfinger v. Choctaw, Etc., R. R. Co.*, 140 Fed. 75; for contrary rule in other cases see *e. g.* *Mountain View v. McFadden*, 180 U. S. 533.

<sup>57</sup> *Re Dunn*, 212 U. S. 374; *Landes v. Felton*, 73 Fed. 311; *Lund v. Chicago, Etc., R. R. Co.*, 78 Fed. 385; *Martin v. St. Louis, Etc., R. R. Co.*, 134 Fed. 134.

<sup>58</sup> *Minnesota v. Northern Sec. Co.*, 194 U. S. 48; *Western Union Co. v. Ann Arbor, Etc., Co.*, 178 U. S. 239; *Gibbs v. Crandall*, 120 U. S. 105.

<sup>59</sup> *Thurber v. Miller*, 67 Fed. 371; *Drovers, Etc., Bank v. Tichenor*, 202 Fed. 1013.

under the act of Congress entitled, "An act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and any amendments thereto. When originally brought in a competent state court, they must remain there and errors against the federal rights of the defendant can only be corrected upon writ of error (now *certiorari*) to the final state tribunal.<sup>60</sup>

§ 11. **Real and Nominal Parties—Initial and Continuous Diversity Required—Aliens.**—It is well settled that the jurisdiction in removal will not be defeated by the joinder or non-joinder of merely formal or nominal parties, without substantial interest, and they will at all times and for all purposes be disregarded.<sup>61</sup>

A state, of course, is not a citizen, and removal is only possible where a state is a real party, upon the ground of federal question;<sup>62</sup> and to constitute a state a real, as distinguished from a nominal, party for the purposes of removal, its interest must be something more than a mere governmental interest in the enforcement of its laws or the welfare of all its citizens. The interest must be the interest of the state as an artificial person.<sup>63</sup>

As heretofore stated, it must appear that the diversity of citizenship existed both when the suit was originally commenced in the state court and when the petition for removal was filed.<sup>64</sup>

<sup>60</sup> J. C., Sec. 28; *Kansas City, Etc., R. R. Co. v. Leslie*, 238 U. S. 599; *Southern R. R. Co. v. Lloyd*, 239 U. S. 496.

<sup>61</sup> *Wood v. Davis*, 18 How. 467; *Bacon v. Rives*, 106 U. S. 99; *Ex parte Nebraska*, 209 U. S. 436; *Wilson v. Oswego Township*, 151 U. S. 56; *Wightman v. Persons*, 126 Fed. 449; *Garrard v. Silver Peak Mines*, 76 Fed. 1; *Hyde v. Victoria Land Co.*, 125 Fed. 970; *Sidway v. Mo. Stock Co.*, 116 Fed. 381; *Cella v. Brown*, 136 Fed. 439.

<sup>62</sup> *Postal Tel., Etc., Co. v. Alabama*, 155 U. S. 482; *Arkansas v. Kansas, Etc., Coal Co.*, 183 U. S. 185.

<sup>63</sup> *Missouri, Etc., R. R. Co. v. Hickman*, 183 U. S. 53.

<sup>64</sup> *Kinney v. Columbia Savings, Etc., Co.*, 191 U. S. 78; *Stevens v. Nichols*, 130 U. S. 230; *Kellam v. Keith*, 144 U. S. 568; *Mattingly v. N. W. R. R. Co.*, 158 U. S. 53.

It will be remembered that citizens of a territory have no citizenship for the purposes of federal jurisdiction. While the statute might be said to contain general language of a contrary import,<sup>65</sup> non-residence “of *that* state” would seem not to require that the defendant removing be a citizen of *another* state. Aliens may remove, where the removal is not sought on the ground of separable controversy, and they are *non-residents* of the state where the action is pending. Where resident within the state, they fall outside of the statutory right of removal in cases of diversity.<sup>66</sup>

Of course, a non-resident, citizen of another state, may remove an action brought by an alien.<sup>67</sup> As to whether a suit brought by an alien and a citizen of a state against a citizen of another state, or *vice versa*, is removable on the ground of diverse citizenship, raises the question heretofore discussed under the original jurisdiction of the District Court; to which reference may be made.<sup>68</sup>

**§ 12. Realignment of Parties—Necessary Parties—False Averment of Citizenship.**—The right of removal being confined to defendants (save in the case of grants from different states), it becomes material to ascertain who may be so considered.

In all removal causes, it is the duty of the court to plainly evolve from the facts shown by the record the actual controversy; and having done so, without regard to the mere placing of parties by the pleader, to assign the real parties to their proper adversary place in either side thereof. If this were not so, the plaintiff could, in many instances, by an arti-

<sup>65</sup> J. C., Sec. 28; cf., *Gerling v. B. & O. R. Co.*, 151 U. S. 673.

<sup>66</sup> *Eddy v. Casas*, 118 Fed. 363; *Walker v. O'Neill*, 38 Fed. 374. These decisions are *wrong*. They should be overruled.

<sup>67</sup> *Bagenas v. Southern Pac. Co.*, 180 Fed. 887; *Barlow v. Chicago, Etc., Ry. Co.*, 163 Fed. 765; *Katalla Co. v. Rones*, 186 Fed. 30; *Stalker v. Pullman Co.*, 81 Fed. 989; *Sherwood v. Newport News Co.*, 55 Fed. 30.

<sup>68</sup> See page 82.



ficial arrangement of the parties in his petition, defeat the right of removal afforded by the laws of the United States; and the temptation to defeat removal of a cause by whatever arrangement possible is frequently strong. Most of the cases in which this transposition is demanded are naturally causes in equity; but the rules of many state codes with respect to parties would, I think, even when fairly observed, require the application of the same procedure in actions at law. Owing to the greater rigidity of common-law rules of pleading, there are few, if any, instances for its application to common-law pleadings. The rule must be applicable both to causes arising under the constitution and laws of the United States and those dependent upon diverse citizenship; though its most frequent application is with respect to the latter.<sup>69</sup>

In determining who is plaintiff and defendant, for purposes of removal, the federal court is interpreting and applying federal law; and it is not bound to follow the provisions of a state statute designating and apportioning the parties. It is its privilege and duty to decide for itself the real and essential relation of the parties to the proceeding.<sup>70</sup>

Where the jurisdiction depends upon diversity of citizenship, the rule (omitting formal or nominal parties) is, that after proper transposition, there must be a total diversity in each and every part of the opposite sides with respect to each other.<sup>71</sup> In the absence, at least, of a separable controversy, I suppose that where a party is *necessary*, as distinguished from merely *formal* or *nominal*, such a party cannot be disregarded, even though not *indispensable*; in accordance with what I understand to be the rule with respect to the

<sup>69</sup> Removal Cases, 100 U. S. 457; Pacific R. R. Co. v. Ketchum, 101 U. S. 289; Harter v. Kenochan, 103 U. S. 562; Francis v. Flinn, 118 U. S. 385; Wilson v. Oswego Township, 151 U. S. 56; Evers v. Watson, 156 U. S. 527; Dawson v. Columbia, Etc., Savings Co., 197 U. S. 178; Boatmen's Bank v. Fritzlen, 135 Fed. 662.

<sup>70</sup> Mason City, Etc., Co. v. Boynton, 204 U. S. 570.

<sup>71</sup> Wilson v. Oswego Township, 151 U. S. 56.

original jurisdiction.<sup>72</sup> The plaintiff cannot cut off the right of removal by any false or mistaken averment as to the citizenship of the parties.<sup>73</sup>

**§ 13. Removal of Causes—Joinder of Applicants—Substituted Parties.**—As a general rule all the defendants must join in the application for removal upon the ground of federal question.<sup>74</sup> The same rule, in the absence of a separable controversy, applies to cases where the removal is sought on the ground of diverse citizenship.<sup>75</sup>

Where some of the defendants have not been served, and do not appear, the plaintiff may elect to dismiss as to those not served or to proceed against those in court, thereby affecting a severance. In such a case the remaining defendants may remove.<sup>76</sup> In the absence of a dismissal or severance, the rule ought to be that all the defendants should join, whether served or not, and that otherwise a removal cannot be obtained. Upon this point, however, there is a difference of opinion. Some of the cases hold, under particular circumstances, that the parties served may remove;<sup>77</sup> and others are to the contrary.<sup>78</sup>

<sup>72</sup> Cf. *Pittsburgh, Etc., Co. v. B. & O. Ry. Co.*, 61 Fed. 705; *Watson v. Bonfils*, 116 Fed. l. c. 160; *Stephens v. Smartt*, 172 Fed. l. c. 472; apparently *contra*: Cf. *Cella v. Brown*, 136 Fed. 439; *Rogers v. Penobscot Co.*, 154 Fed. 606.

<sup>73</sup> *T. & P. R. R. Co. v. Cody*, 166 U. S. 606; *Harrington v. R. R.*, 169 Fed. 714.

<sup>74</sup> *Chicago, Etc., R. R. Co. v. Martin*, 178 U. S. 245; *Gableman v. Peoria, Etc., Ry. Co.*, 179 U. S. 335, l. c. 337; *Cochran v. Montgomery County*, 199 U. S. 260; *Heffelfinger v. Choctaw, Etc., R. R. Co.*, 140 Fed. 75; *Yarnell v. Felton*, 104 Fed. 161; *Miller v. Bank*, 116 Fed. 551.

<sup>75</sup> *Chicago, Etc., R. R. Co. v. Martin*, 178 U. S. 245; *Cochran v. Montgomery County*, 199 U. S. 260; *Blackburn v. Blackburn*, 142 Fed. 901; *Miller v. Clifford*, 133 Fed. 880.

<sup>76</sup> *Berry v. St. Louis, Etc., R. R. Co.*, 118 Fed. 911.

<sup>77</sup> *Bowles v. Heinz*, 188 Fed. 937; *Tremper v. Schwabacher*, 84 Fed. 413; Cf. *Diday v. New York, Etc., R. R. Co.*, 107 Fed. 565; *Walker v. Richards*, 55 Fed. 129.

<sup>78</sup> *Patchin v. Hunter*, 38 Fed. 51; *Armstrong v. Kansas City, Etc., R. R. Co.*, 192 Fed. 608; Cf. *Putnam v. Ingraham*, 114 U. S. 59; *Hax v. Caspar*, 31 Fed. 499.

As a general rule, substituted or intervening parties would seem to have no right to remove, after the time of the original parties has expired.<sup>79</sup>

§ 14. **Separable Controversies—Aliens—Determined by Face of Complaint—Fraud.**—Taking up the question of separable controversy, the provision therefor is contained in the same section with and immediately follows the language quoted above relative to federal controversies and diverse citizenship. The particular clause relating to separable controversies reads as follows: (dd) “And when in any *suit* mentioned in this section there shall be a *controversy* which is *wholly* between *citizens of different states*, and which can be fully determined as between them, then either one or more of the defendants, actually interested in such *controversy*, may remove said *suit* into the District Court of the United States for the proper district.”<sup>80</sup>

By the term *controversy*, as here used, is meant something less than the whole *suit*.

By that term is meant a cause of action, embraced and included within the suit, which can, however, be separated and disentangled therefrom; and when so separated and distinguished, is of such a character that a separate and distinct suit might properly have been brought thereon, and complete relief afforded therein between the parties thereto in the federal courts, without the presence of others made plaintiff or defendant in the original suit.<sup>81</sup>

Under the terms of the statute, this separable controversy must be wholly between citizens of different states. It necessarily follows that the statute does not give a right of removal

<sup>79</sup> Cable v. Ellis, 110 U. S. 389; Houston, Etc., R. R. Co. v. Shirley, 111 U. S. 358; Jefferson v. Driver, 117 U. S. 272; Kidder v. Northwestern Life Co., 117 Fed. 997; Cf. Chase v. Beach Creek Co., 144 Fed. 571; Speckert v. National Bank, 98 Fed. 151; Fletcher v. Hamlet, 116 U. S. 408.

<sup>80</sup> J. C., Sec. 28.

<sup>81</sup> Barney v. Latham, 103 U. S. 205; Fraser v. Jennison, 106 U. S. 191; Ayres v. Wiswall, 112 U. S. 187.

on the ground of a separable controversy to an alien defendant.<sup>82</sup>

In the limpid language of one of my distinguished predecessors in this school, the right of removal “only exists in those cases brought in a state court, in which there are two or more controversies or causes of action capable of separation into two or more independent suits, one of which controversies is wholly between citizens of different states.”<sup>83</sup>

For the purpose of valid removal on the ground of separable controversy, there must exist, within the suit, a separate and distinct cause of action with respect to which all essential parties on one side are citizens of different states from those on the other. The suit must be capable of separation into parts, so that one of those parts will present a controversy with citizens of one or more states on one side and citizens of other states upon the other, which can be fully determined without the presence of any of the other parties to the suit as it was originally begun.<sup>84</sup>

The whole subject-matter of the suit, in so far as it affects them, must be capable of being fully determined as between the parties to the separable controversy, and complete relief afforded as to the separable controversy, without the presence of the others originally made parties.<sup>85</sup>

In the absence of allegations of fraud, the existence of a separable controversy must be determined by the state of the pleadings or record in the state court, at the time of the application for removal; without reference to the petition for removal itself.<sup>86</sup>

The allegations of the declaration or complaint must be taken as confessed.<sup>87</sup>

<sup>82</sup> *King v. Cornell*, 106 U. S. 395; *Merchants, Etc., Co. v. Insurance Co.*, 151 U. S. 368; *Tracy v. Morel*, 88 Fed. 801.

<sup>83</sup> Thayer: *Jurisdiction of Federal Courts*, p. 20.

<sup>84</sup> *Geer v. Mathieson Alkali Works*, 190 U. S. 428.

<sup>85</sup> *Torrence v. Shedd*, 144 U. S. 527; *Merchants, Etc., Co. v. Insurance Co.*, 151 U. S. 368.

<sup>86</sup> *Graves v. Corbin*, 132 U. S. 571; *Louisville, Etc., Co. v. Wangelin*, 132 U. S. 599; *Wilson v. Oswego Township*, 151 U. S. 56.

<sup>87</sup> *East Tenn., Etc., Co. v. Grayson*, 119 U. S. 240.

In the absence of proper charges of fraud (contrived to defeat federal jurisdiction) the fact that the defendants show by answer that the liability is several, cannot change the character of the case made by the plaintiff's pleading; for the cause of action is the subject-matter of the *controversy* and for the purposes of removal is whatever the plaintiff has declared it to be in his pleadings.<sup>88</sup>

§ 15. **Charge of Joint Liability—General Tests for Separability—State Laws Generally Applied.**—No false or fraudulent statement being claimed, a defendant has no right to insist that a cause of action shall be treated as several or divisible, which the plaintiff in good faith has elected to make entire and indivisible against all the defendants. The plaintiff must be permitted to prosecute his suit in his own way.<sup>89</sup>

It makes no difference that a several action would have lain against each of the defendants, or that they assert several defenses; for separate defenses do not make separate controversies.<sup>90</sup>

The Supreme Court has seldom undertaken to lay down specific canons for the determination of the existence, under particular circumstances, of a separable controversy. It has laid down the rule that an action brought against several defendants to recover damages caused by concurrent negligence is to be regarded as entire and indivisible.<sup>91</sup>

It has further laid down the rule in equity causes that, for the removal of a separable controversy, all parties who are not indispensable may be disregarded; and this has been

<sup>88</sup> Alabama, Etc., R. R. Co. v. Thompson, 200 U. S. 206; Southern R. R. Co. v. Carson, 194 U. S. 136; Torrence v. Shedd, 144 U. S. 527.

<sup>89</sup> Louisville, Etc., Ry. Co. v. Ide, 114 U. S. 52; Pirie v. Twedt, 115 U. S. 41; Little v. Giles, 118 U. S. 596; Torrence v. Shedd, 144 U. S. 527; Alabama, Etc., R. R. Co. v. Thompson, 200 U. S. 206.

<sup>90</sup> Louisville, Etc., Ry. Co. v. Wangelin, 132 U. S. 599; Plymouth, Etc., Co. v. Amador, 118 U. S. 264; Fidelity, Etc., Co. v. Huntington, 117 U. S. 280; Graves v. Corbin, 132 U. S. 571; Powers v. Chesapeake, Etc., Co., 169 U. S. 92; Chesapeake, Etc., R. R. Co. v. Dixon, 179 U. S. 131; see also cases cited just above.

<sup>91</sup> Chesapeake, Etc., R. R. Co. v. Dixon, 179 U. S. 1. c. 139.

followed in practically all the cases, though I think it is doubtful in principle.<sup>92</sup>

It has further held that where parties plaintiff have a right to join, and elect to sue jointly, the Court is incapable of distinguishing their case, so far as jurisdiction is concerned from those cases in which the plaintiffs are compelled to unite.<sup>93</sup>

The default of a co-defendant who has no diversity and judgment against him by default does not entitle a defendant sued jointly with him to remove the cause as then becoming a separable controversy.<sup>94</sup>

It would far transcend the limits to which we must confine ourselves, were we to undertake to harmonize and deduce a system of rules from the decisions, which would be of general value.

I think the true rule is, that whether or not there is a joint liability charged (and justified by law) is to be determined by the settled law of the state, whether of statutory or judicial origin.<sup>95</sup>

**§ 16. How Fraudulent Joinder Attacked—Trial—Motive.**—If a joinder is fraudulent, for the purpose of preventing removal, the federal courts cannot supinely suffer such fraud to be successful. The only way to consummate a fraud of this sort, is to make false statements of fact, constituting or supporting a charge of joint liability.

It is necessary to assert the false and fraudulent character of these statements, in order to obtain removal; and the only

<sup>92</sup> *Barney v. Latham*, 103 U. S. 205; *Boatmen's Bank v. Fritzlen*, 135 Fed. 662.

<sup>93</sup> *Peninsular Iron Co. v. Stone*, 121 U. S. 631; *Merchants, Etc., Co. v. Insurance Co.*, 151 U. S. 368.

<sup>94</sup> *Brooks v. Clark*, 119 U. S. 502; *Putnam v. Ingraham*, 114 U. S. 57.

<sup>95</sup> *Chicago, Etc., R. R. Co. v. Dowell*, 229 U. S. 1. c. 112; *Chicago, Etc., R. R. Co. v. Willard*, 220 U. S. 413; *Alabama, Etc., Ry. Co. v. Thompson*, 200 U. S. 206; *Cincinnati, Etc., Ry. Co. v. Bohon*, 200 U. S. 221; *Chesapeake, Etc., R. R. Co. v. Dixon*, 179 U. S. 1. c. 140; *Connell v. Utica, Etc., Co.*, 13 Fed. 241; *Chicago, Etc., Ry. Co. v. Whiteaker*, 239 U. S. 1. c. 424.

vehicle for such an assertion is the petition for removal. In what form should the assertion be couched? We might deny simply those allegations in the complaint, which untruthfully recite facts tending to show the joint liability; but this would be to require the federal court, upon an application for removal, to try practically the whole case, as under a general denial. We might simply assert that these statements were false and fraudulent; but these words are mere epithets and conclusions, which would leave the court under the same necessity. Such burdens the court will not assume.<sup>96</sup>

The petition for removal is really a pleading; and, as in other pleadings, there must be a statement of the facts relied upon, not otherwise shown by the record, in order that the Court may draw the proper conclusions, and that the opposite party may join issue. It is not enough to traverse, or apply the epithet "fraudulent;" but a statement of facts must be set forth, rightly engendering that conclusion—compelling the inference that the joinder is without right and is made in bad faith.<sup>97</sup>

The standard of requirement is well-illustrated in the case of *Wecker v. National Enameling Co.*, which was tried and carried up by one of our own bar.<sup>98</sup>

The truth or falsity of the petition for removal is to be tested, not in the state, but in the federal, court. The state court has absolutely no right to go behind its allegations of fact.<sup>99</sup>

Where, however, in making the joinder complained of, the plaintiff was justified by the state law (and *bona fide* supported by evidence) in pleading a joint liability, his motive is

<sup>96</sup> *Southern Ry. Co. v. Lloyd*, 239 U. S. 496; *Chicago, Etc., Ry. Co. v. Whiteaker*, 239 U. S. 421; *Chesapeake, Etc., R. R. Co. v. Cockrell*, 232 U. S. 146.

<sup>97</sup> *Chesapeake, Etc., R. R. Co. v. Cockrell*, 232 U. S. 146.

<sup>98</sup> 204 U. S. 176.

<sup>99</sup> *Chesapeake, Etc., R. R. Co. v. Cockrell*, 232 U. S. 146; *Chicago, Etc., R. R. Co. v. Dowell*, 229 U. S. 102; *Ill. Cent. Ry. Co. v. Sheegog*, 215 U. S. 308; *K. C. Belt Ry. Co. v. Herman*, 187 U. S. 63.

immaterial; and although the purpose was to prevent removal, such an exercise of a right afforded by the settled law of the state cannot be considered as fraudulent.<sup>100</sup>

The fact that the jury in the state courts find for the other defendants and against the defendant seeking to remove has no tendency to prove fraudulent joinder in the beginning.<sup>101</sup> The burden of proof to establish the fraudulent joinder is on the petitioner, who seeks removal.<sup>102</sup>

**§ 17. Removal of Separable Controversy Removes Whole Case.**—Upon the removal of a separable controversy the whole suit is transferred to the federal court, and nothing is left behind for the state court to try. At least such is the rule laid down by the Supreme Court and followed by most of the lower courts.<sup>103</sup>

The test of the federal jurisdiction is thus made the involution of a separable controversy, of which the federal court would have had jurisdiction, had that controversy stood alone; and the remainder of the suit is treated as ancillary or dependent, and made subject to the federal jurisdiction, although it draw for determination into the federal court subsidiary or co-ordinate controversies, over which, taken alone, no federal jurisdiction could have been maintained.

The language of the statute is, "one or more of the defendants actually interested in such controversy may remove said *suit* into the district court of the United States for the proper district."

<sup>100</sup> *Chicago, Etc., R. R. Co. v. Whiteaker*, 239 U. S. 421; *Chicago, Etc., R. R. Co. v. Schwyhart*, 227 U. S. 184; *Chicago, Etc., R. R. Co. v. Dowell*, 229 U. S. 102; *Chicago, Etc., R. R. Co. v. Willard*, 220 U. S. 413; *Ill. Cent. R. R. Co. v. Sheegog*, 215 U. S. 308.

<sup>101</sup> *Ill. Cent. R. R. Co. v. Sheegog*, 215 U. S. 308.

<sup>102</sup> *Plymouth, Etc., Co. v. Amador, Etc., Co.*, 118 U. S. 264; *K. C. Belt Ry. Co. v. Herman*, 187 U. S. 63.

<sup>103</sup> *Barney v. Latham*, 103 U. S. 205; *Brooks v. Clark*, 119 U. S. 502; *Graves v. Corbin*, 132 U. S. l. c. 591; *Connell v. Smiley*, 156 U. S. l. c. 341; *Sheldon v. Keokuk, Etc., Co.*, 1 Fed. 789; *Wabash, Etc., Co. v. Central Trust Co.*, 23 Fed. 513; *Western Union, Etc., Co. v. Brown*, 32 Fed. 337; *Atlantic, Etc., Co. v. Carter*, 88 Fed. 707; *Buck v. Felder*, 196 Fed. 419.



Unquestionably the language of the statute justifies and requires the removal of the whole suit, as distinguished from the separable controversy.

The language of the constitution is "The judicial power shall extend . . . to controversies . . . between citizens of different states." The effect of this holding is to assert that where a federal element is present in the case, in the form of a separable controversy between wholly diverse citizens, this federal element renders federally justiciable the whole suit of which that controversy forms a part.

The holding assumes that it is impossible to determine the separable controversy, without determining the whole suit of which it forms a part; and reasons that as jurisdiction over the *controversy* is plainly conferred by the constitution, so may jurisdiction over the rest of the case follow as an incident. A distinction is sometimes drawn where there are really several suits consolidated into one as in condemnation proceedings.<sup>104</sup>

The dismissal of the separable controversy would seem to end the jurisdiction of the federal court, which is, in itself, a strong argument against the power of the federal court to justiciate at all the remainder of the suit.<sup>105</sup>

<sup>104</sup> *Chicago v. Hutchinson*, 15 Fed. 129; *Deepwater R. R. Co. v. Western, Etc., Co.*, 152 Fed. 824; *Re Stutsman*, 88 Fed. 337; Cf. *Mfrs. Com. Co. v. Brown, Etc., Co.*, 148 Fed. 308; cf., also, *In re Chicago*, 64 Fed. 897.

<sup>105</sup> *Texas, Etc., Co. v. Seeligson*, 122 U. S. 519; *Torrence v. Shedd*, 144 U. S. 527.

## **CHAPTER 'VI.**

### **DISTRICT COURT—REMOVAL OF CAUSES CONTINUED.**

- § 1. Method of Removal—Federal Question—Diverse Citizens.
- 2. Petition for Removal Matter of Record—State Court Limited to Record—Remedies for Denial.
- 3. Registration of State Court's Jurisdiction—Waiver and Estoppel.
- 4. Time for Removal—Waiver and Estoppel.
- 5. Filing Transcript—Notice of Application to Remove.
- 6. Amending Petition—Remanding—No Review.
- 7. Effect of Removal.
- 8. Removal for Local Prejudice—Statute.
- 9. Does Not Apply to Separable Controversies.
- 10. Local Prejudice Merely Extends Time to Remove.
- 11. Local Prejudice—Method of Removal.
- 12. Method of Transfer—Trial—Remand—No Review.
- 13. Total Diversity Required—Aliens—Policy of Act.
- 14. Removal in Civil Rights Cases—Nature.
- 15. Civil Rights—Removal of Criminal Prosecutions.
- 16. Removal of Proceedings Against Revenue Officers—Officers of Congress—of U. S. Courts.
- 17. Claims of Land Under Different States.
- 18. Right of Removal—State Restrictions.

§ 1. **Method of Removal—Federal Question—Diverse Citizens.**—When removal is sought on the ground that the suit arises under the Constitution, laws or treaties of the United States, or involves diverse citizenship or a separable controversy, the party or parties entitled to remove, "may make and file a petition, duly verified, in such state court, at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file herewith a bond with good and sufficient surety, for his or their entering in such

§ 2 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the district court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein.

“It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond shall be given the adverse party or parties prior to filing the same.

“The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.”<sup>1</sup>

**§ 2. Petition for Removal Matter of Record—State Court Limited to Record—Remedies for Denial.**—A petition for removal, when filed in the state court, becomes a part of the record, and the record as a whole must show the jurisdictional facts upon which the right of removal depends; otherwise the state court is not bound to surrender its existing jurisdiction.<sup>2</sup>

The state court is entitled to decide, in the first instance, the pure question of law whether the petitioner, taking as conceded all the facts asserted, is entitled to removal,<sup>3</sup> but all issues of fact upon a petition for removal must be tried

<sup>1</sup> J. C., Sec. 29.

<sup>2</sup> *Phoenix Ins. Co. v. Pechner*, 95 U. S. 183; *Stone v. South Carolina*, 117 U. S. 430; *Crehore v. Ohio, Etc., R. R. Co.*, 131 U. S. 240; *Powers v. Chesapeake, Etc., R. R. Co.*, 169 U. S. 92; *Madisonville, Etc., Co. v. St. Bernard, Etc., Co.*, 196 U. S. 239; *Alabama, Etc., Ry. Co. v. Thompson*, 200 U. S. 206.

<sup>3</sup> *Stone v. South Carolina*, 117 U. S. 432; *Burlington, Etc., Co. v. Dunn*, 122 U. S. 513.

in the federal court.<sup>4</sup> The right of removal cannot be disregarded because the state court is of the opinion that no cause of action is stated in the plaintiff's pleading.<sup>5</sup> If the case in law be a removable one, then upon the due filing of proper petition and bond the case is in law instantly removed and all subsequent proceedings in the state court will be absolutely void;<sup>6</sup> unless by waiver or estoppel the jurisdiction of the state court be restored.

If the state court over the objection of defendant to its jurisdiction, persists in retaining and asserting jurisdiction, the defendant may proceed to defend the cause upon the merits, and if it be decided against him, may finally obtain federal review of his right to remove by writ of error (now *certiorari*) to the appropriate state court.<sup>7</sup> Or he may pay no further attention to the state court, and prosecute his defense to a judgment in his favor in the federal court, and rely with entire security upon that judgment, until it be reversed or set aside by competent federal authority.<sup>8</sup> Or he may present his petition to the federal court, as ancillary to the removal proceeding, praying an order enjoining plaintiff from taking any further steps in the state court and it will be granted.<sup>9</sup>

**§ 3. Restoration of State Court's Jurisdiction—Waiver and Estoppel.**—The jurisdiction of the state court may be restored by the action of the parties. Thus where one of the original parties filed his petition and bond for the removal of a separable controversy, and before any order had been

<sup>4</sup> *Ibid.* Kansas City, Etc., Co. v. Daughtry, 138 U. S. 298; Ill. Cent. R. R. Co. v. Sheegog, 215 U. S. 1. c. 325.

<sup>5</sup> Marshall v. Holmes, 141 U. S. 589.

<sup>6</sup> B. & O. R. R. Co. v. Koontz, 104 U. S. 5; Madisonville, Etc., Co. v. St. Bernard, Etc., Co., 196 U. S. 239; Steamship Co. v. Tugman, 106 U. S., 1. c. 122.

<sup>7</sup> B. & O. R. R. Co. v. Koontz, 104 U. S. 5; C. & O. R. R. v. McCabe, 213 U. S. 207; Missouri Pac. R. R. Co. v. Fitzgerald, 160 U. S. 556; C. & O. R. R. Co. v. McDonald, 214 U. S. 191; Stone v. South Carolina, 117 U. S. 430.

<sup>8</sup> C. & O. R. R. Co. v. McCabe, 213 U. S. 207.

<sup>9</sup> Madisonville, Etc., Co. v. St. Bernard, Etc., Co., 196 U. S. 239.

### § 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

made thereon or the record filed in the federal court, the plaintiff dismissed his case against the party removing, and the petition for removal was thereupon withdrawn, and the cause proceeded with, without any objection, between the remaining parties, their conduct was equivalent to a formal waiver of new process and pleadings, and restored the jurisdiction of the state court.<sup>10</sup>

Similarly where the applicant for removal thereafter proceeds to affirmatively invoke the jurisdiction of the state court, by bringing in new parties that destroy the federal jurisdiction, and recovering against them a judgment in the same proceeding, he submits to the state jurisdiction, and waives his application for removal.<sup>11</sup> So a party may waive a removal to the federal court, by making his application conditional, and by subsequently invoking the jurisdiction of the state court.<sup>12</sup> Making a defense in the state court, after a petition for removal is filed, and overruled by the state court, to which objection is made and exception saved, does not constitute a waiver of the right of removal.<sup>13</sup>

On the other hand, where the federal jurisdiction is invoked by a party seeking removal and the cause falls within the class of cases of which the federal court is given jurisdiction, he is estopped to assert that the removal was improper, and that the judgment therein recovered against him is void.<sup>14</sup> Of course, where the character of the cause is such that a federal court could exercise no jurisdiction thereover, there can be no estoppel and no jurisdiction; and this may be asserted even by the party seeking the removal.<sup>15</sup>

The right to remove is not waived because, the day after the right to remove was made apparent, the defendant success-

<sup>10</sup> *Anderson v. United Realty Co.*, 222 U. S. 164.

<sup>11</sup> *Texas, Etc., Co. v. Eastin*, 214 U. S. 153.

<sup>12</sup> *Manning v. Amy*, 140 U. S. 137.

<sup>13</sup> *Powers v. Chesapeake, Etc., R. R. Co.*, 169 U. S. 92.

<sup>14</sup> *Baggs v. Martin*, 179 U. S. 206.

<sup>15</sup> *Chicago, Etc., R. R. Co. v. Willard*, 220 U. S. 413.

fully argued its motion to stay proceedings, pending an appeal on the validity of service.<sup>16</sup>

§ 4. **Time for Removal — Waiver and Estoppel.** — The statute provides with respect to the time when removal must be sought, that the petition and bond be filed in the state court “at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. . . .”

The federal courts have dealt with some liberality in giving effect to the right of removal so limited.

The provision as to time is not so essentially jurisdictional, as for example the existence of diversity of citizenship, but is (like most of the requirements of this particular section) rather modal and formal, and consequently may be waived under proper circumstances. It is analogous to the direction that a civil suit within the original jurisdiction shall be brought in a particular district.<sup>17</sup>

The jurisdiction of the district court of the United States over a cause removed into it from a state court can not be defeated upon the ground that the petition for removal was filed too late if the objection was not taken until the case has proceeded to trial in the federal court.<sup>18</sup> A party who participates in a removal cannot be heard to raise an objection as to the time of removal.<sup>19</sup> Apart from waiver by invocation of or consent to the jurisdiction, there is still another exception engrafted upon the strict statutory rule that the petition for removal must be filed as soon as the defendant is required by law to make any defenses whatever in the state court. Upon this point the Supreme Court has expressed itself as follows: “To construe that provision as restricting

<sup>16</sup> *Remington v. Central, Etc., R. R. Co.*, 198 U. S. 95.

<sup>17</sup> *Gerling v. B. & O. R. R. Co.*, 151 U. S. 673; *Ayers v. Watson*, 113 U. S. 594.

<sup>18</sup> *French v. Stewart*, 22 Wall. 238; *Gerling v. B. & O. R. R. Co.*, 151 U. S. 673.

<sup>19</sup> *Ayers v. Watson*, 113 U. S. 594; *Connell v. Smiley*, 156 U. S. 335.

§ 4 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

to the time prescribed for answering the declaration, the removal of a cause which is not a removable one at the time, would not only be inconsistent with the words of the statute, but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiffs were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than . . . (the jurisdictional amount) and was afterwards discovered to be so much graver, that there could be no doubt of the power and duty of the court to allow an amendment increasing the *ad damnum*. The reasonable construction of the act of Congress and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right; and to consider the statute, as in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it is brought.’’<sup>20</sup>

It was held in that case, that when upon the calling of the case for trial in the state court, the plaintiff voluntarily discontinued as to the defendants whose presence was a bar to removal, the cause for the first time became removable, and the defendant could, by promptly filing his petition and bond, transfer the jurisdiction to the federal court. So it has been held that the petition for removal is not too late, if it be filed as soon as it appears that the case is a removable one.<sup>21</sup>

This does not mean that removal is possible, generally, after the determination of the merits of the case as to some of

<sup>20</sup> Powers v. Chesapeake, Etc., Co., 169 U. S. 92.

<sup>21</sup> Remington v. Cent. Pac. R. R. Co., 198 U. S. 95; and cases cited.

the parties. The very object of removal is to secure a trial in the federal courts. But it was not intended to give the defendant the right in all cases, after a long and expensive hearing, to insist that the cause becomes removable as to him when a co-defendant whose presence barred removal is, contrary to the contentions of the plaintiff, discharged from the cause upon demurrer to the evidence, at the close of plaintiff's case in the state court. How this question might be decided, if the remaining defendant charged in a petition for removal, promptly filed, that the joinder had always been fraudulent, and that the defendant seeking to remove had just become aware of the fraud may be doubtful.<sup>22</sup>

A petition for removal is in time where it is filed as soon as the petitioner has learned of changes in the pleadings made by the plaintiff without notice, which for the first time confer upon the case a removable character.<sup>23</sup> An order remanding the cause to the state court does not control the right to make a second application for removal, if it results from subsequent proceedings that the cause has become a removable one.<sup>24</sup> The time under the statute for making the application for removal is not extended; however, by change of the venue to another county, thereby extending the time for pleading beyond that allotted for pleading in the county of original institution.<sup>25</sup>

The question has arisen in the lower federal courts as to whether the time for removal (which is considered as modal and formal, and subject to the operation of waiver and estoppel), could not be extended by stipulation or agreement of the parties or whether an agreement by a party extending his adversary's time for pleading in the state court, would not estop him from moving for remand or making objection to the late filing of the petition for removal. To this question

<sup>22</sup> Cf. *Whitcomb v. Smithson*, 175 U. S. 635; *K. C. Belt R. R. Co. v. Herman*, 187 U. S. 63; *Lathrop, Etc., Co. v. Interior Constr. Co.*, 215 U. S. 246.

<sup>23</sup> *Fritzlen v. Boatmen's Bank*, 212 U. S. 364.

<sup>24</sup> *Ibid.*

<sup>25</sup> *B. & O. R. R. Co. v. Burns*, 124 U. S. 165.



various answers have been returned.<sup>26</sup> The same question has arisen where the time to plead has been extended by the state court, and like contrariety exists in the rulings of the lower federal courts.<sup>27</sup> My own notion is against the right of extension in either case, except in pursuance of express general rule or statute.

**§ 5. Filing Transcript—Notice of Application to Remove.** The statute makes it a condition of the bond that the party removing should enter in the District Court of the United States, “within thirty days from the date of filing said petition, a certified copy of the record in such suit, . . . and for their appearing and entering special bail in such suit if special bail was originally requisite therein.” . . .

Under the holding of the Supreme Court, it would seem that a failure to file the transcript of the record would not restore the jurisdiction of the state court, which is gone with the due and timely filing of the petition and bond for removal. The jurisdiction of the federal court attaches as against that of the state court from that moment.<sup>28</sup> Failure to file would seem to be assimilated in practice to a default in pleading, which can be set aside or disregarded for good cause in the court in which the removal proceeding is pending. The party against whom the removal has been had may himself file the record in the federal court, and proceed with the cause

<sup>26</sup> Cf. extending time; *Chiatovich v. Hanchett*, 78 Fed. 193; *Groton v. Bridge Co.*, 137 Fed. 284; *Russell v. Harriman*, 145 Fed. 745; *Hansford v. Stone*, 201 Fed. 185; *Contra*: *Austin v. Gagan*, 39 Fed. 626; *Martin v. Carter*, 48 Fed. 596; *Fox v. Railway Co.*, 80 Fed. 945; *Heller v. Ilwaco Co.*, 178 Fed. 111; *Wayt v. Standard Co.*, 189 Fed. 231; *Daugherty v. Tele. Etc., Co.*, 61 Fed. 138.

<sup>27</sup> Cf. extending time: *Wilcox v. Phoenix Co.*, 60 Fed. 929; *Lord v. Lehigh Valley Co.*, 104 Fed. 929; *Avent v. Lumber Co.*, 174 Fed. 298; *State Improvement Co. v. Leininger*, 226 Fed. 884. *Contra*: *Spangler v. R. R. Co.*, 42 Fed. 305; *Frink v. Blackinton*, 80 Fed. 306; *Fox v. Ry. Co.*, 80 Fed. 945; *Williams v. Fruit Co.*, 222 Fed. 467; *Watt v. Nitrogen Co.*, 189 Fed. 231.

<sup>28</sup> *National Steamship Co. v. Tugman*, 106 U. S. 118.

or may pray a remand for failure to prosecute the removal with effect.<sup>29</sup>

The requirement of notice to the adverse party of the application for removal is new. It ought to be held to be modal and formal and the subject of waiver, though if insisted upon in timely fashion, not to be safely disregarded.<sup>30</sup> The notice is ordinarily accompanied with a copy of the petition and bond.

§ 6. **Amending Petition—Remanding—No Review.**—We have heretofore stated that the state court is not bound to surrender its jurisdiction unless the record at the time of the removal sought (including as a part of that record the petition for removal), showed, taking all averments as true, that the cause was removable. Counsel would be something more or less than human, if it did not occasionally happen that the petition for removal omits to state at all, or states imperfectly, from the standpoint of good pleading, some grounds of removal that are not apparent in the rest of the record.

To prevent unseemly conflicts of jurisdiction, the federal courts have laid down the rule, with respect to the amendment of such application, that a total failure of the whole record to show removability, can never authorize or justify retention; and that the courts of the United States (at least) can not permit an amendment of the petition for removal, unless in some form the right to the removal can be gathered from the record as it then exists; in other words, that an amendment is only proper where the facts and grounds justifying removal, are, at the very least, imperfectly shown by the record.<sup>31</sup> Thus the averment of conclusions rather than facts may be so amended as to show the facts.<sup>32</sup>

<sup>29</sup> Cf. *B. & O. R. R. Co. v. Koontz*, 104 U. S. 5; *St. Paul, Etc., R. R. Co. v. McLean*, 108 U. S. 212.

<sup>30</sup> Cf. *Goins v. Southern Pac. Co.*, 198 Fed. 432; *U. S. v. Sessions*, 205 Fed. 502; *Wanner v. Bissinger*, 210 Fed. 96; *Arthur v. Maryland Casualty Co.*, 216 Fed. 386.

<sup>31</sup> *Parker v. Overman*, 18 How. 137; *Carson v. Dunham*, 121 U. S. 421; *Crehore v. Ohio, Etc., R. R. Co.*, 131 U. S. 240; *Gerling v. B. & O. R. R. Co.*, 151 U. S. 673; *Powers v. Chesapeake, Etc., R. R. Co.*, 169 U. S. 92.

<sup>32</sup> *Carson v. Dunham*, 121 U. S. 421; *Kinney v. Columbia, Etc., Co.*, 191 U. S. 78.

§ 7 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

How far the state court might go in permitting amendment is uncertain.<sup>32a</sup>

Under the express provisions of section 28 of the Judicial Code, "whenever any cause shall be removed, from any state court into the District Court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."<sup>33</sup>

This statute bars *mandamus* to retain jurisdiction;<sup>34</sup> nor will a writ of error to the state court, after remanding and final decision of the cause, be permitted to review its action in obeying the order of remand made by a competent federal tribunal.<sup>35</sup>

§ 7. **Effect of Removal.**—Taking up the effect of removal upon the action pending in the state court and the rights acquired thereunder, it may be stated as a general rule that the plaintiff loses nothing in the way of substantial right or advantage by the removal of the case into the federal court. This rule, however, like most other legal rules, is subject to exceptions. In matters of general jurisprudence, as will be hereafter explained, the law administered by the federal courts is sometimes diametrically opposed to the doctrines laid down by and respected by the state courts within the jurisdiction; and a removal is sometimes earnestly sought by the defendant with the purpose of securing the benefit of this difference.

The strongly marked distinction between law and equity, and the constitutional right to jury trial, frequently prohibits

<sup>32a</sup> Cf. *Roberts v. Pacific, Etc., Co.*, 104 Fed. 577.

<sup>33</sup> *Morey v. Lockhart*, 123 U. S. 56; *Powers v. Chesapeake, Etc., Co.*, 169 U. S. 92; *Mo. Pac. R. R. Co. v. Fitzgerald*, 160 U. S. 556.

<sup>34</sup> *Ex parte Pennsylvania Co.*, 137 U. S. 451.

<sup>35</sup> *Nelson v. Maloney*, 174 U. S. 164; *Whitcomb v. Smithson*, 175 U. S. 635.

the federal courts from uniting and blending matters of legal and equitable cognizance in the same proceeding, whereas this is usually permitted by modern state statutes. It thus frequently happens on this account that a repleader is necessary, and that a single suit in the state court must be segregated into two in the federal tribunal.

It sometimes even has happened that the federal courts have been compelled to decline jurisdiction altogether, because the particular proceeding could under no circumstances have been maintained in the original jurisdiction. Thus, where a state statute conferred the right upon a simple contract creditor to maintain a creditor's bill in the courts of the state, to set aside a conveyance in fraud of creditors, it was held that such a cause could not be removed into the federal court; because the defendant was entitled to a jury trial upon the question whether there was any indebtedness at all.<sup>36</sup>

State statutes as to publication in attachment proceedings which have been removed from the state courts, without service of process, can not be availed of by the federal courts; but where a state court has secured jurisdiction, under state laws, of attached property, such jurisdiction is not lost on the ground that original attachments cannot be maintained in the federal courts without jurisdiction of the person of the defendant.<sup>37</sup>

Similarly, where the laws of a state provide for the revival of an action for personal injuries by the executor of the plaintiff, the right is not lost but inheres in the cause as removed.<sup>38</sup>

Where the law of the state in which the suit is brought vests the right of action in the wife, the federal courts upon removal will adhere to the same rule.<sup>39</sup>

The general rule is illustrated by a number of other cases.<sup>40</sup>

<sup>36</sup> *Cates v. Allen*, 149 U. S. 451.

<sup>37</sup> *Clark v. Wells*, 203 U. S. 164.

<sup>38</sup> *B. & O. R. R. Co. v. Joy*, 173 U. S. 226.

<sup>39</sup> *Tex. & Pac. R. R. Co. v. Humble*, 181 U. S. 57.

<sup>40</sup> Cf. *Cowley v. Northern Pac. R. R. Co.*, 159 U. S. 569; *Fidelity, Etc., Co. v. Bucki*, 189 U. S. 135.

On the other hand, as a general rule, the defendant neither gains or loses by removal, and the cause proceeds substantially as if no removal had taken place;<sup>41</sup> the filing of bond and petition for removal does not amount to a general appearance, so as to confer jurisdiction over the person;<sup>42</sup> and the defendant unquestionably has the right to show that the state court had no jurisdiction, or that the complaint does not set forth a cause of action.<sup>43</sup>

The plaintiff retains his right to dismiss voluntarily his suit after the removal, and to rebring the same in the state court with the same or added defendants jointly liable; and such dismissal will not preclude or affect his cause of action.<sup>44</sup>

It is provided by Section 36 of the Judicial Code that "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held, to answer final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

§ 8. **Removal for Local Prejudice — Statute.** — We next direct our attention to removal on account of *prejudice or*

<sup>41</sup> *De Lima v. Bidwell*, 182 U. S. 1; *East Tenn., Etc., Co. v. Southern Tel. Co.*, 112 U. S. 306.

<sup>42</sup> *Wabash R. R. Co. v. Brow*, 164 U. S. 271.

<sup>43</sup> *De Lima v. Bidwell*, 182 U. S. 1; *Mechanical, Etc., Co. v. Castleman*, 215 U. S. 437.

<sup>44</sup> *Southern R. R. Co. v. Miller*, 217 U. S. 209; *Gassman v. Jarvis*, 100 Fed. 146; *Texas, Etc., Co. v. Starnes*, 182 Fed. 183.

*local influence.* The language of the statute is (ddd) : “And where a suit is now pending or may hereafter be brought, in any state court, *in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state*, any defendant, being such citizen of another state, may remove such *suit* into the district court of the United States for the proper district, at any time before the trial thereof, when it is made to appear *to said district court*, that from *prejudice or local influence* he will not be able to obtain justice in such state court, or in any other state court to which said defendant may, under the laws of the state, have the right on account of such prejudice or local influence, to remove said cause; *provided*, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such *prejudice or local influence*, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the state court to be proceeded with therein.”<sup>45</sup>

§ 9. **Does Not Apply to Separable Controversies.**—Looking carefully at the letter of this enactment, it will be observed that it requires a *suit* in a state court, and in that suit there must be a *controversy* between a citizen of the forum and a citizen of *another state*. It would not seem to be required that the controversy be one of a plurality of controversies embraced within the same suit, but to allow that the controversy either be co-extensive and co-incident with the whole suit, or one of a number embraced therein. Upon the analogy of the doctrines laid down with respect to separable controversies, we should expect to find it held, that in removals upon the ground of prejudice or local influence, any defendant being a party only to a controversy which was less than, or embraced only one of the issues in the suit, might be permitted to remove the suit, where the necessary diversity

<sup>45</sup> J. C., Sec. 28.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

was present between the parties to that controversy, though absent as to the other parties to the suit.

In other words, where there was but a single controversy, which was co-incident with the entire suit, entire diversity must exist between the parties plaintiff and defendant; but where there was a separable controversy, the diversity need be present only between the parties to that controversy.

I do not understand, however, that such an interpretation is given to the instant clauses of the statute by the controlling decisions of the Supreme Court.

§ 10. **Local Prejudice Merely Extends Time to Remove.** The statute is to be treated as setting up a subordinate instance of removal under the general ground of diversity of citizenship.<sup>46</sup>

In the language of Justice Harlan: "The subsequent clause relating to prejudice and local influence, does not describe a new class of suits, removable from the state courts, but only specifies a distinct ground for removing one class of the suits previously defined, namely: *that* class in which there is a controversy between citizens of different states."<sup>47</sup>

Being a subordinate instance of the jurisdiction by reason of diverse citizenship, and that jurisdiction existing only where a sum exceeding three thousand dollars, exclusive of interest and costs, is involved, the courts hold that the right of removal on the ground of prejudice or local influence does not exist in any case unless the sum or value of the matter in dispute is of that amount.<sup>48</sup>

It is further held by what I conceive to be controlling authority, that the provisions for removal, on this ground, are substantially the same, in meaning and effect, as the third clause of section 639 of the Revised Statutes which was repealed by the present law; and it was intended that no

<sup>46</sup> *Ex parte Pennsylvania Co.*, 137 U. S. 451.

<sup>47</sup> *Malone v. Richmond, Etc., R. R. Co.*, 35 Fed. 625.

<sup>48</sup> *Ex parte Pennsylvania Co.*, 137 U. S. 451; *Cochran v. Montgomery County*, 199 U. S. 260; *Malone v. Richmond, Etc., R. R. Co.*, 35 Fed. 625.

removal could be had of any suit hereunder unless that suit, in its entirety, could have been maintained under the original jurisdiction of the district court upon the ground of diversity of citizenship, and that in consequence, no suit can be removed on the ground of prejudice or local influence, unless all the parties on one side of the *suit* are citizens of different states from those on the other side.<sup>49</sup>

The effect of the matter seems to be, as stated by Judge Lurton, "that the existence of prejudice and local influence does not furnish a separate and independent ground of removal, and operates only to extend the time within which a cause may be removed, when the requisite diversity of citizenship exists."<sup>50</sup>

There have been able opinions to the contrary in the lower federal courts; some of them asserting powerfully the right of removal even in the absence of any separable controversy, and although parties of the same citizenship may be on opposite sides.<sup>51</sup>

§ 11. **Local Prejudice—Method of Removal.**—The statute does not set out with particularity the precise method of effectuating a removal on the ground of prejudice or local influence. It must "*be made to appear to said district court*" that from prejudice or local influence, the non-resident defendant applying will not be able to obtain justice in the particular state court, or in any other court to which the cause can be removed.

<sup>49</sup> *Cochran v. Montgomery County*, 199 U. S. 260; *Case of the Sewing Machine Cos.*, 18 Wall. 553; *Myers v. Swan*, 107 U. S. 547; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54; *Hancock v. Halbrook*, 119 U. S. 586; *Young v. Ewart*, 132 U. S. 267; *Hanrick v. Hanrick*, 153 U. S. 192; *Rosenthal v. Coates*, 148 U. S. 142; *Southern R. R. Co. v. Thomason*, 146 Fed. 972.

<sup>50</sup> *Cleveland v. C. C. C., Etc., R. Co.*, 147 Fed. 171; *Armstrong v. K. C. Southern R. Co.*, 192 Fed. 608.

<sup>51</sup> Cf. *Fritzlen v. Boatmen's Bank*, 135 Fed. 650; *Campbell v. Miliken*, 119 Fed. 985; *Haire v. Rome R. Co.*, 57 Fed. 321; *Whelan v. N. Y., Etc., R. Co.*, 35 Fed. 849; *Fisk v. Henarie*, 32 Fed. 417.



## § 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

The obvious method is by petition presented to the federal court. That court must be legally satisfied that the defendant will not be able to obtain justice in the state court; and legal satisfaction requires some proof suitable to the nature of the case. The petition for removal should set forth the *facts* upon which the application is founded, and should, at the least, be verified by the affidavit of some credible person having knowledge of the facts. More proof being required by the court, it should be furnished.<sup>52</sup>

A formal affidavit of mere *belief* is clearly insufficient.<sup>53</sup> It is laid down by the Court of Appeals for the Eighth Circuit that an *ex parte* affidavit ought never to be taken as a valid basis of removal; but that the parties opposed should have notice of the application and an opportunity to contest it. The court may receive evidence upon the point by affidavits, deposition or oral testimony.<sup>54</sup> At the least, it is better practice to allow counter-affidavits to be filed.<sup>55</sup>

If an *ex parte* removal is ordered, the adverse side must be permitted to try out the propriety of removal, upon an application to remand, or in some similar fashion.<sup>56</sup>

**§ 12. Method of Transfer—Trial—Remand—No Review.**  
—The cause is not in law removed on the ground of local prejudice, until an order for removal has been made by the federal court, and the right to a removal on this ground is solely determinable by that court and on evidence that is satisfactory to it. The proper course is to obtain an order from the federal court for the removal, file that order in the state court, take out a transcript from the state court and file it in the federal court. As a matter of comity the state court is entitled to proper notice of the assumption of juris-

<sup>52</sup> *Ex parte Pennsylvania Co.*, 137 U. S. 451.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Schwenk v. Strang*, 59 Fed. 209.

<sup>55</sup> *Maher v. Tower Hotel Co.*, 94 Fed. 225; *Bonner v. Meikle*, 77 Fed. 485.

<sup>56</sup> *Ellison v. L. & N. R. R. Co.*, 112 Fed. 805.

diction by the federal authority. At the very least, these or some analogous steps are requisite for orderly transfer.<sup>57</sup>

A refusal of a co-defendant to join in the application for removal is of no consequence, where the necessary diversity exists; for the statute expressly extends the right to any defendant, and was designed to afford to him the right of fair hearing, regardless of the attitude of those joined with him.<sup>58</sup>

One defendant, however, cannot remove because of local prejudice existing between himself and another defendant.<sup>59</sup>

Where the cause appears to be separable, the suit, in so far as it relates to other defendants, may be remanded to the state court to be proceeded with therein, the remainder being determined in the federal court.<sup>60</sup>

It would seem that there can not be a removal after the hearing on a demurrer to a complaint, based upon the ground that it did not state facts sufficient to constitute a cause of action, this being deemed a "trial" within the meaning of former laws.<sup>61</sup>

It is settled that a case cannot be removed on the ground of prejudice or local influence, after there have been three trials in the state court.<sup>62</sup>

So it is too late after a mistrial in the probate court.<sup>62a</sup>

In accordance with the general rule in removed causes, no appeal, writ of error, or mandamus will lie to delay or prevent remand to the state court.<sup>63</sup>

<sup>57</sup> *Pennsylvania Co. v. Bender*, 148 U. S. 255; *Bartlett v. Gates*, 117 Fed. 362.

<sup>58</sup> *Cochran v. Montgomery County*, 199 U. S. 273.

<sup>59</sup> *Hanrick v. Hanrick*, 153 U. S. 198.

<sup>60</sup> *Fisk v. Henarie*, 142 U. S. 459; J. C., Sec. 28.

<sup>61</sup> *Fisk v. Henarie*, 142 U. S. 459; *Laidly v. Huntington*, 121 U. S. 179; *Gregory v. Hartley*, 113 U. S. 742; *Alley v. Nott*, 111 U. S. 472.

<sup>62</sup> *Fisk v. Henarie*, 142 U. S. 459.  
S. 229.

<sup>62a</sup> *McDonnell v. Jordan*, 178 U. S. 229.

<sup>63</sup> *In re Pennsylvania Co.*, 137 U. S. 451; *German National Bank v. Speckert*, 181 U. S. 405.

§ 13. **Total Diversity Required—Aliens—Policy of Act.**  
—In order that a suit may be removed upon the ground of prejudice or local influence, it seems that all the plaintiffs must be citizens of the state where the suit is brought, and all the defendants citizens of another state or states.<sup>64</sup>

The policy of the removal is to submit to a court, less subject to local influence and popular clamor, the cause of a non-resident, against whom or in favor of whose resident adversary there exists a local sentiment, whether it be based upon prejudice or predilection. It need not be a prejudice against the party seeking the removal. A plaintiff may be so powerful, so intrenched in the partisan regard of his community as to render it difficult for a court directly responsive to popular will to afford justice to the stranger. A foreign corporation or individual may be so maligned or detested as to render it impossible to suppose the absence of bias. The sentiment may relate either to the person of the litigant or the subject-matter of the controversy. It may exist in a case triable by jury from the vicinage, or by the judge elected therefrom. It applies to questions of law as well as of fact. It may be political or social.

Whatever be the cause, the federal court to whom application is made must be induced to believe that there exists an improper bias or unreasonable predilection or prepossession, of such a character as to render unlikely the obtaining of justice in the state courts whose jurisdiction may be invoked for the trial of the controversy.<sup>65</sup>

By the terms of the statute it would seem plain that a suit to which an alien is a party cannot be removed upon this

<sup>64</sup> *Young v. Ewart*, 132 U. S. 267; *Cochran v. Montgomery County*, 199 U. S. 260; Cf. *Thouron v. East Tenn., Etc., R. R. Co.*, 38 Fed. l. c. 678; *Rike v. Floyd*, 42 Fed. 247; *Gaun v. Northeastern R. R. Co.*, 57 Fed. 417.

<sup>65</sup> Cf. *Adelbert College v. Toledo, Etc., R. Co.*, 47 Fed. 836; *Detroit v. Detroit City Ry.*, 54 Fed. 1; *Herndon v. Southern Ry. Co.*, 76 Fed. 398; *Smith v. Crosby Lumber Co.*, 46 Fed. 819; *Hall v. Chattanooga, Etc., Co.*, 48 Fed. 599; *Montgomery County v. Cochran*, 116 Fed. 985; *Tacoma v. Wright*, 84 Fed. 836.

ground.<sup>66</sup> Abuse of the right is further safeguarded by providing that at any time after removal, and before trial, the district court, upon application of the adverse party, may examine into the truth of the grounds for removal, and shall, unless satisfied that justice cannot be obtained in the state court, remand the cause thereto.

Where the state statute confers a discretion upon the judge to grant or refuse a change of venue, this is no bar to the removal.<sup>67</sup>

§ 14. **Removal in Civil Rights Cases—Nature.**—It is further provided by section 31 of the Judicial Code, that “when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against (1) any person who is denied or cannot enforce in the judicial tribunals of the state or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the *equal civil rights* of citizens of the United States, or of all persons within the United States, or (2) against any officer, civil or military, or other person for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for *equal civil rights* as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending.”<sup>68</sup>

The procedure to be employed is set forth in the immediately following provisions.

<sup>66</sup> Cf. *Cochran v. Montgomery County*, 199 U. S. 260; *Young v. Ewart*, 132 U. S. 267; *Grand Trunk R. R. Co. v. Twitchell*, 59 Fed. 727; J. C., Sec. 28.

<sup>67</sup> *Tacoma v. Wright*, 84 Fed. 836; *Parker v. Vanderbilt*, 136 Fed. 250.

<sup>68</sup> J. C., Sec. 31.

§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

This statute rests upon and is designed to enforce the provisions of the Fourteenth Amendment and federal legislation enacted thereunder; but the interpretation of the amendment is broader than that given to the statute.<sup>69</sup>

Taking up the first clause of the statute, it is well settled that the amendment is not a restriction upon the conduct of private individuals, but upon the action of the state. A state may act either by its judicial or executive departments as well as by its legislature, and the prohibition of the *amendment* extends to official action in any of those departments. The provision for removal, contained in the *statute*, contemplates a transfer before the trial. Not until the trial itself can the defendant know that his equal rights will be denied him by the officers of the state, where there is no mandate of the state compelling them to adopt such a course. It is, however, to be safely presumed that they will perform their duties in consonance with the enacted laws of their state.

It is, therefore, held and firmly established that the denial of civil rights which will authorize the transfer of a cause upon this ground from the state to the federal court must be a denial by the constitution or laws of the state, and not by unwarranted executive or judicial action. The statute has reference to a legislative denial, or an inability resulting from it.<sup>70</sup>

An example of its proper operation is given where a state statute by its terms excludes negroes from service on juries, where a negro is the defendant.<sup>71</sup>

Official discrimination, not based upon state legislation, if counter to the Fourteenth Amendment, must ordinarily be corrected upon writ of error (now *certiorari*) to the state

<sup>69</sup> *Rives v. Virginia*, 100 U. S. 313; *Gibson v. Mississippi*, 162 U. S. 565.

<sup>70</sup> *Rives v. Virginia*, 100 U. S. 313; *Murray v. Louisiana*, 163 U. S. 101; *Gibson v. Mississippi*, 162 U. S. 565; *Powers v. Kentucky*, 201 U. S. 1.

<sup>71</sup> *Strauder v. West Virginia*, 101 U. S. 303.

court of final resort from the Supreme Court of the United States.<sup>72</sup>

There seems to be little or no authority dealing with the second clause of the statute.

**§ 15. Civil Rights — Removal of Criminal Prosecutions.**—In so far as this statute authorizes the removal of a criminal prosecution, instituted by the state, it is remarkable as a great extension of the power of the federal courts.

We have heretofore pointed out that the punishment of offenses is, in the highest degree, the assertion and vindication of sovereignty; and that under the general principles of international law, no nation will undertake to avenge the violation of the criminal law of another. A state of this Union, however, is not a pure sovereign, but subject in all manifestations of its authority and existence to the paramount provisions of the constitution and laws of the United States; and its sovereignty is equally so qualified, even when engaged in the supreme power of vindicating its penal laws.

It is accordingly settled that Congress, in order to maintain the supremacy and secure the observance of federal rights and immunities, may validly authorize the removal of a prosecution for a state offense into the federal courts; although the apparently strange result is effected that the judge and officers of the United States thereby administer the police functions of the state.

The presence of the federal element confers jurisdiction over the whole cause.<sup>73</sup>

Before a prosecution can be said to be commenced, however, within the meaning of the statute, there must be an indictment found or information filed by the proper officers of the state; and proceedings before a magistrate to commit a person to jail or hold him to bail to answer for a crime of which the magistrate has no jurisdiction are preliminary and do not constitute the commencement of a prosecution.<sup>74</sup> Of

<sup>72</sup> See cases in two preceding notes.

<sup>73</sup> Cf. *Tennessee v. Davis*, 100 U. S. 257; *Virginia v. Paul*, 148 U. S. 107.

<sup>74</sup> Cf. *Virginia v. Paul*, 148 U. S. 107.

§ 16 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

course, the cause is conducted in the federal court by the prosecuting officers of the state.

§ 16. **Removal of Proceedings Against Revenue Officers—Officers of Congress—Of U. S. Courts.**—It is also provided by Section 33 of the Judicial Code, as amended, as follows: “When any civil or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of *any revenue law* of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of *any such law*, or on account of any right, title or authority claimed by such officer or other person *under any such law*; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such *revenue law*; or against any officer of the *Courts of the United States* for or on account of any act done under color of his office or in the performance of his duties as such officer; or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an *officer of either House of Congress* in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may at any time before the trial *or final hearing* thereof, be removed for trial into the district court . . . upon the petition of such defendant *to said district court*. . . .”

The procedure is marked out with considerable fullness in the subsequent portions of the statute. The leading case dealing with the removal of a criminal prosecution under these provisions is that of *Tennessee v. Davis*.<sup>75</sup>

Within the space allotted to us I deem it impracticable to deal minutely with the details of practice and transfer hereunder. The provision respecting officers of courts is very recent. Upon a liberal construction it might include *receivers*; but I do not think such was the intention.

<sup>75</sup> 100 U. S. 257; Cf. *Davis v. South Carolina*, 107 U. S. 597; *Virginia v. Felts*, 133 Fed. 84.

The procedure applicable to the removal of a personal action brought by an alien against a citizen of a state, who is, or at the time the alleged action accrued was, a civil officer of the United States, and is a non-resident of the state wherein jurisdiction is obtained by personal service of process, is the same as prescribed for revenue causes; and the cases are so rare as to render it unnecessary and impracticable to deal further with the provision.<sup>76</sup>

§ 17. **Claims of Land Under Different States.**—The statute relating to removal of causes where citizens of the same state are claiming land under grants of different states is in part as follows: “Where in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court requires it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that one or more of the adverse parties inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial.”<sup>77</sup>

It is then provided that if claim is asserted, in response to the inquiry, under such grant from another state, any one or more of the parties moving for the information may remove the cause into the district court in the same manner as provided in cases of diversity of citizenship; but the party or parties removing the cause shall not be permitted to plead

<sup>76</sup> J. C., Sec. 34.

<sup>77</sup> J. C., Sec. 30.



§ 18 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

or rely in evidence upon *any other title than that stated*, as aforesaid, as the ground of his or their claim.

The apparent limitations upon the exercise of this right of removal are such that a party might well hesitate to invoke it save either in a very clear or a very desperate case. I have been able to find, after a fairly careful search, less than a half dozen cases dealing in any wise with this statute in the whole range of the federal reports. The provision is set forth for the purpose of completely exhibiting the general subject of removals. For practical use it is of absolutely no importance. The muck-rakers have suggested that the jurisdiction was granted for the protection of speculative gentlemen holding vast quantities of cheap land under doubtful and disputed grants.

§ 18. **Right of Removal—State Restriction.**—A word remains to be said with reference to certain statutory provisions enacted by a number of states, in an endeavor to curtail, by indirection, the jurisdiction of the federal courts. An instance is afforded by Section 7043 of the Revised Statutes of Missouri, whereby it is provided that if any foreign insurance or surety company, doing business under license in this state, shall, without the written consent of the other party, remove any suit brought against it in the courts of the state to the federal court, or shall institute any suit or proceeding against any citizen of this state in a federal court, its license to do business in this state shall be forfeited and revoked by the State Superintendent of Insurance for a period of five years.

The rule generally is, that the right to originally initiate in or remove a cause to a federal court, given by a constitutional act of Congress, can not be taken away or abridged by state statute.

On the other hand, a state ought to have the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the federal constitution. The subject-matter has had a rather weird history. *Home Insurance Co. v.*

Morse is the first important case.<sup>78</sup> A statute of Wisconsin required foreign insurance companies to consent and stipulate in advance (upon being admitted into the state) that they would not remove any causes into the federal courts. The insurance company, contrary to its contract, filed a petition for removal, which was denied by the state court, upon the ground that the right had been bargained away. The Supreme Court of the United States reversed this holding, upon very broad grounds; holding that the company had the same right of removal as an individual citizen of another state, and that the contract was void, as an attempt to waive the jurisdiction of the federal courts.

The next case was *Doyle v. Insurance Co.*<sup>79</sup> There the state had added a provision, directing the Secretary of State to revoke the license of a foreign corporation removing a suit to the federal court. It was there held that the former decision was correct, as applied to the facts of that case; but that the permit here was a mere license revocable at will, regardless of motive.

The next case was *Barron v. Burnside*.<sup>80</sup> The state of Iowa had passed laws requiring foreign corporations obtaining a permit to do business to stipulate that the permit was subject in all respects to the provisions of those laws. Those laws provided, among other things, that any such foreign corporation should forfeit its permit, if it removed a cause to the federal courts. This was held invalid, the court insisting that its decision was in perfect harmony with the preceding cases.

After a number of intervening cases, in *Prewitt v. Security Mutual Life Insurance Co.*,<sup>81</sup> the Supreme Court undertook to harmonize the cases, arriving at substantially the following result: where the state statute provides that before being permitted to enter the state, the foreign corporation must stipulate and agree that it will not remove any cases to the

<sup>78</sup> 20 Wall. 445.

<sup>79</sup> 94 U. S. 535.

<sup>80</sup> 121 U. S. 186.

<sup>81</sup> 202 U. S. 146.

federal courts, such a stipulation and agreement is void, as being a contract contrary to law; and where such invalid provision is so involved in the statute as not to be separable, the whole statutory provision for forfeiture of which it formed a part will be held bad.

But where the statute simply provides, as upon a mere conditional limitation, that whenever any removal is attempted or undertaken, the power to do business shall cease, it is held valid; upon the theory that the total power to prohibit includes the power to prohibit indirectly through any, even a capricious, condition consequent.

This has already been departed from, at least to the following extent: (a) where the corporation is engaged in both interstate and intrastate commerce, and such a statute imposes a limitation or forfeiture of the right to do intrastate business because of removal, the statute is void;<sup>82</sup> (b) where such a corporation has, prior to the passage of the state statute, already been permitted to enter the state and acquire large properties therein, it becomes a person, and cannot be penalized for removal, where similar domestic corporations would not be.<sup>83</sup>

What further implication may be drawn from these late decisions, it is difficult to say. The court has been shifting its position, and it appears as if they were endeavoring to settle down to the proposition that all such state statutes are void, as constituting attempts to destroy federal jurisdiction.

There has never been any doubt that a state could not exclude a corporation that was a governmental agency or was engaged strictly in interstate commerce.<sup>84</sup>

<sup>82</sup> *Donald v. Philadelphia, Etc., Coal Co.*, 241 U. S. 329; *Harrison v. St. Louis, Etc., R. R. Co.*, 232 U. S. 318.

<sup>83</sup> *Herndon v. Chicago, Etc., R. R. Co.*, 218 U. S. 135.

<sup>84</sup> *Pembina, Etc., Co. v. Pennsylvania*, 125 U. S. 181; *Pensacola Tel. Co. v. Western Union Co.*, 96 U. S. 1; *Horn Silver Co. v. New York*, 143 U. S. 305; *Pullman, Etc., Co. v. Kansas*, 216 U. S. 1. c. 67.

## CHAPTER VII.

### PROCEDURE AT LAW.

- § 1. General Considerations.
- 2. Rules of Court—Binding Character.
- 3. Statutory Authority to Enact Rules—Conformity Act.
- 4. Statutory Powers Continued—The Rules Enacted by the Supreme Court.
- 5. Interpretation of Conformity Act—Judicial Discretion.
- 6. Unimpaired Powers of the Judge.
- 7. No Application to Structure, Jurisdiction or Relationship to Other Federal Courts—Equitable Defenses.
- 8. Proceedings Controlled By Conformity Act.
- 9. Evidence—Competency of Witnesses.
- 10. Mode of Proof—Depositions—Physical Examination.
- 11. Order of Proof—Cross Examination Confined to Direct.
- 12. Production of Books and Papers—Subpoena Duces Tecum.
- 13. Trial By Jury—Waiver—Peculiar Original Result.
- 14. Written Waiver By Statute—Arbitrators—Auditors—Statutory Reference.
- 15. Jury Composition—Direction of Verdict—Judgment Non Obstante.
- 16. Charge of Court—Exceptions Should Be Specific.
- 17. Amendments.
- 18. Attachments—Executions.
- 19. Stay of Execution—Motion for New Trial—Abuse of Discretion.

§ 1. **General Considerations.**—The power to create and establish a court includes the power to fix the scope and manner in which its existence shall be manifested and made effectual. The legislature has undoubted power (in the absence of particular limitation) to fix the procedure by which the court shall be governed, so long, at least, as it does not undertake to trench upon powers judicial in their nature.<sup>1</sup>

<sup>1</sup> Cf. *Livingston v. Story*, 9 Pet. 1. c. 656.

§ 1 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

As a matter of interpretation, the term court of law naturally involves, in a jurisprudence borrowed from another country, the notion of such established forms of activity as essentially characterized the common-law courts of that country. So the term court of equity would naturally suggest that such a court, in the absence of contrary legislation, would exercise its remedial powers in general consonance with the practice of courts of equity in the country whence the conception was derived, and to which reference was impliedly made in the statute of creation. The inference with respect to courts of admiralty would be similar.

No state can limit the sovereign judicial powers of the United States, nor prescribe modes or regulations for the manner of their exercise. No citizen of a state can have a vested right in the federal courts to the peculiar procedure established by his particular state. It is therefore established that the federal courts, whether of law, equity or admiralty, in the absence of federal requirements, are not bound by the laws of a state fixing simply the procedure for the enforcement of rights as distinguished from state laws creating rights of a substantive character inhering in and qualifying the legal relation between the parties.<sup>2</sup> It is probable that, in the absence of express or implied requirement to the contrary, courts of law of the United States would follow in matters of procedure the analogy of the common law, with such developments as may be or have been made therein by federal decisions interpreting and applying it to our local situation; that the United States courts of equity would follow by analogy the general practice of the high court of chancery; and that the courts of admiralty would model their procedure in conformity with the practices current generally among the courts administering that system of laws. By the term procedure, as here distinguished from substantial rights, is meant such matters as the allocation of jurisdiction to particular courts and process, pleading and practice.

<sup>2</sup> Cf. *Green v. Biddle*, 8 Wheat. 1. c. 105; *Beers v. Haughton*, 9 Pet. 1. c. 359.

§ 2. **Rules of Court — Binding Character.** — While the constitution contemplated that the government created by it should consist of a trinity of departments, and that these departments should be largely separate, this conception does not, on the one hand, deprive the legislature of the power, in creating courts, to establish regulations marking out the particular scope of their activity, nor, on the other hand, deprive the courts of their inherent power to prescribe rules for the effectual administration of their jurisdiction, so long as such rules are not contrary to common right or the laws expressly or impliedly laid down by the legislature.

The basis of such a power in the courts lies in the proposition that where a power (jurisdiction) is granted, the necessary incidents to the orderly exercise of that power are understood to be granted with it. A valid rule of court has even been held to have the force of law and, until abrogated, to be binding upon the court as well as upon the parties to an action.<sup>3</sup>

§ 3. **Statutory Authority to Enact Rules—Conformity Act.**—In considering the manner in which the jurisdiction vested in the federal courts is in fact exercised, it will be convenient to discuss separately, to some extent, (1) courts of law, (2) of equity and (3) of admiralty. The procedure in each of these courts may be regulated (a) by the statutes of the United States; (b) by rules of court, and (c) to some extent by the respective analogies of the common law, the English equity system and the general law of admiralty.

It was provided by the Act of 1842 as follows:

“The Supreme Court shall have full power and authority, from time to time, to prescribe and regulate and alter the forms of writs and other process to be used and issued in the district courts and circuit courts of the United States, and the forms and modes of framing and filing libels, bills,

<sup>3</sup> *Rio Grande, Etc., Co. v. Gildersleeve*, 174 U. S. 603; *Contra*, *Omaha Electric, Etc., Co. v. Omaha*, 216 Fed. 848; *Poultney v. Lafayette*, 12 Pet. 472; *U. S. v. Breitling*, 20 How. 252.

§ 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

answers and other proceedings and pleadings in *suits at common law, or in admiralty or equity*, pending in the said courts and also the forms and modes of taking and obtaining evidence and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering and enrolling decrees, and the forms and modes of proceedings before trustees appointed by the court, and generally to regulate the whole practice of said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.”<sup>4</sup>

Upon the compilation of the Revised Statutes of the United States the foregoing statute was modified into Section 917 of the Revised Statutes, reading after modification as follows:

“Section 917. The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery or proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the Court, and generally to regulate the whole practice to be used, *in suits in equity or admiralty*, by the circuit and district courts.”

It will be observed that, as modified, the statute apparently refers only *to suits in equity or admiralty*; whereas, as originally enacted, it plainly included suits *at common law* as well. Now at the time of the original enactment, the foregoing statute was immediately followed by a modification of an older act of Congress, which as then modified, corresponds substantially with Section 918 of the Revised Statutes, reading as follows:

“Section 918. The several circuit and district courts may from time to time, and in any manner not inconsistent with

<sup>4</sup> 5 Stat. 518.

any law of the United States, *or with any rule prescribed by the Supreme Court under the preceding section*, make rules and orders directing the return of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.” In 1872<sup>5</sup> a statute was enacted which has passed into the Revised Statutes as Section 914, providing that:

*“The practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, any rule of court to the contrary notwithstanding.”*

It might seem that the intention of this last statute was to peremptorily require that the federal courts of law should follow as nearly as was possible (in view of their structure and the laws of the United States conditioning their action) the procedural laws of the state, so that diverse methods of administering justice might not unduly distract the bar of a state from the merits of a cause to the mazes of differing procedure.

The actual result has, to some extent, disappointed that expectation, and Congress is now considering a return to provisions of the same general sort as the original act of 1842, with the hope that the Supreme Court will make greater use of such powers than it did before.

**§ 4. Statutory Powers, Continued—The Rules Enacted by the Supreme Court.**—Notwithstanding the omission of suits at law from the provisions of Section 917, it is held by the Supreme Court of the United States that under the clause

<sup>5</sup> 17 Stat. 197.



declaring "the Supreme Court shall have power to prescribe from time to time and in any manner not inconsistent with any law of the United States, the forms of writs and other process," that court has power to regulate by rule the manner of proceeding in taking bail, upon writs of error from the Supreme Court to the district courts in civil or criminal cases; and that such matters were not included within the provision of Section 914.<sup>6</sup>

Several rules of the Supreme Court accordingly deal with and regulate the making up of exceptions and the allowance of appeals or writs of error by the lower courts.<sup>7</sup>

Under the foregoing statutory powers, the Supreme Court has also promulgated an elaborate series of equity rules (the last revision of which went into effect February 1, 1913), and a set of rules in admiralty; to both of which we shall hereafter have occasion to refer. Under Section 30 of the Bankruptcy Law, the Supreme Court was directed and empowered to frame and promulgate all necessary rules, forms and orders for procedure in cases of bankruptcy; and agreeably to this authority the Supreme Court has prescribed a system of "General Orders in Bankruptcy," which, together with the "official forms," adopted by the same tribunal, constitute an important source of bankruptcy law.

Under Section 25 of the Copyright Act, of March 4, 1909, the Supreme Court has also framed a set of rules in Copyright cases.

Most of the law applicable to appeals and writs of error is found in the rules of the Supreme Court and the various courts of appeals.

**§ 5. Interpretation of Conformity Act—Judicial Discretion.**—Taking up, in the first place, the procedure at law, it will be observed that the provisions of Section 914 (which is known as the conformity act) relate to (1) the *practice*, (2) *pleadings and* (3) *forms and modes of proceedings* in civil

<sup>6</sup> Hudson v. Parker, 156 U. S. 277.

<sup>7</sup> Cf. Rule 4; Rule 29.

causes at law. The conformity required is not absolute, but "*as near as may be*," any rule of court to the contrary notwithstanding. The federal courts have given to this language a somewhat restrictive interpretation, and have weakened the force of the section by construing it as vesting judicial discretion, and as qualified by the power to enact rules conferred upon the inferior courts by Section 918. As a human matter, the judges of the federal courts could hardly be expected, without absolutely clear direction, to reduce the courts of the nation to a condition of slavish subserviency to the last caprice of a state legislature, or shift their established course of practice by the see-saw of state decisions.

Such a course of action would have gone far toward converting the federal courts into mere subordinate state tribunals and deprived them of independence and responsibility in their administration of justice. It was certainly not intended by Section 914 to require that in the course of adherence to state procedure in the particulars specified, the federal courts should disregard the law of their creation, and proceed contrary to the expression or implication of federal statutes. Their structure, practice and jurisdiction, as delimited by the constitution and laws of the United States, must be preserved.<sup>8</sup>

It was not intended to prevent their just administration of the law in the light of their own system of jurisprudence.

The phrase "*as near as may be*" does not mean as near as possible, or as near as practicable; but it was intended to confer upon the judges of the United States a *discretion* to adopt or reject any subordinate provisions (as distinguished from *general* conformity) of state statutes or rules of practice, which, in their judgment, would unwisely encumber the administration of the law, or defeat the ends of justice in their tribunals. This discretion was intended to be exercised largely in the adoption, from time to time, of general rules, so regulating the practice in their courts as might be necessary for

<sup>8</sup> Mexican Cent. Ry. Co. v. Pinkney, 149 U. S. 194; Luxton v. North River, Etc., Co., 147 U. S. 337; Phelps v. Oaks, 117 U. S. 236; Southern Pacific Co. v. Denton, 146 U. S. 202; O'Connell v. Reed, 56 Fed. 531; Erstein v. Rothschild, 22 Fed. 64.

the advancement of justice and the prevention of delays in proceedings.<sup>9</sup>

§ 6. **Unimpaired Powers of the Judge.**—A judge vested with certain essential powers and duties in the government of a judicial proceeding is one of the indispensable elements of the common-law conception of a court. The personal conduct of that officer, in the exercise of such control and the discharge of his common-law functions, is unquestionably, to a very large extent, subject to legislative direction; but in pursuance of that policy of restrictive interpretation to which we have referred, it is held that “the personal conduct and administration of the judge in the discharge of his separate functions is . . . neither practice, pleading nor a form nor mode of procedure” within the meaning of those terms as used in the statute.<sup>10</sup>

It is accordingly held that a state statute limiting the charge of the court to written declarations of law, and requiring such declarations to be given to the jury, together with other papers introduced in evidence, when they retire to make up their verdict, is not operative in the federal courts.<sup>11</sup>

The judge of a federal court may, at his discretion, comment upon the evidence and express his opinion upon the facts, so long as no rule of law is incorrectly stated, and the ultimate determination of matters of fact is left to the jury; and neither a state constitution nor a state statute can abridge this prerogative.<sup>12</sup>

<sup>9</sup> *Indianapolis, Etc., R. R. Co. v. Horst*, 93 U. S. 291; *Shepard v. Adams*, 168 U. S. 618; *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194; *Chappell v. U. S.*, 160 U. S. l. c. 514; *Southern Pac., Etc., Co. v. Denton*, 146 U. S. 202; *St. Charles v. Stookey*, 154 Fed. l. c. 778; *Boatmen's Bank v. Trower*, 181 Fed. 804; *Hein v. Westinghouse Co.*, 168 Fed. 766; 164 Fed. 79; *Lowry v. Story*, 31 Fed. 769; *Wall v. C. & R. R. Co.*, 95 Fed. 398; *Sanford v. Portsmouth*, 2 Flippin 105; *Times, Etc., Co. v. Carlisle*, 94 Fed., l. c. 771.

<sup>10</sup> *Nudd v. Burrows*, 91 U. S. 426; *Indianapolis, Etc., Co. v. Horst*, 93 U. S. 291; *Knight v. Ill. Cent. R. R. Co.*, 180 Fed. 368.

<sup>11</sup> *Ibid.* Cf. *Lincoln v. Power*, 151 U. S. 436.

<sup>12</sup> *Vicksburg, Etc., Co. v. Putnam*, 118 U. S. 545; *St. Louis, Etc., Co. v. Vickers*, 122 U. S. 360.

A state statute cannot compel the judge to require a special verdict.<sup>13</sup>

Upon the same principle, a federal judge can not, in conformity with state practice, be compelled to submit special interrogatories to the jury, to be answered by them in addition to the rendition of a general verdict;<sup>14</sup> but, on the other hand, if a discretion so to do is conferred by the laws and decisions of the particular state, this discretion may be exercised by federal, as well as state judges.<sup>15</sup>

The granting or refusing of a new trial in the federal courts has always been held to rest in the sound discretion of the judge, which was not reviewable upon writ or error; and this discretion (there being no fixed and substantial *right*), was not intended by the statute to be limited or destroyed by the state's regulation of its own practice and procedure.<sup>16</sup>

**§ 7. No Application to Structure, Jurisdiction or Relationship to Other Federal Courts—Equitable Defenses.**—As heretofore suggested, the provisions of Section 914 do not include such matters as relate to the jurisdiction or essential structure of the federal courts, nor to their relation to other federal courts. A state statute, which provides that a special appearance shall constitute a general submission to the jurisdiction of the court, would interfere, if observed in the federal courts, with the territorial limitations upon federal jurisdiction, which it is the policy of the federal laws to preserve.<sup>17</sup>

So a statute or rule of practice as to admission of parties would not be followed where the result would be to oust the courts of the United States of their rightfully acquired jurisdiction.<sup>18</sup>

<sup>13</sup> United States, Etc., Ass'n v. Barry, 131 U. S. 100.

<sup>14</sup> Indianapolis, Etc., R. R. Co. v. Horst, 93 U. S. 291.

<sup>15</sup> Grimes v. Malcolm, 164 U. S. 483.

<sup>16</sup> R. S. 726; Newcomb v. Wood, 97 U. S. 581; Mo. Pac. R. R. Co. v. Chicago, Etc., R. R. Co., 132 U. S. 191; Fishburn v. Chicago, Etc., R. R. Co., 137 U. S. 60.

<sup>17</sup> Southern Pac., Etc., Co. v. Denton, 146 U. S. 1. c. 209.

<sup>18</sup> Phelps v. Oaks, 117 U. S. 236.

The fixed distinction between courts of equity and of law established by the Constitution and laws of the United States prevents the uniting of legal and equitable causes of action or defenses in the same pleading, in accordance with a state code of civil procedure;<sup>19</sup> but a recent statute has modified this rule with respect to the joinder of legal and equitable *defenses*.

It is now provided by the act of March 3, 1915, that in all actions at law equitable defenses may be interposed by answer, plea or replication, without the necessity of filing a bill on the equity side of the court. In such event, the defendant may even obtain affirmative relief (upon appropriate prayer), by way of answer or plea. This is a revolutionary change in federal policy; but it is as yet too soon to mark out its limits.

The rule established by a state that the sheriff's return is conclusive, in the particular action, of service of process as therein recited concerns the jurisdiction of the court; and such a rule does not bind the federal court where its jurisdiction is in issue.<sup>20</sup>

Nor does the conformity statute apply to proceedings for reviewing in the appellate courts of the United States the judgment of an inferior tribunal. The taking, perfecting, settling and signing of a bill of exceptions, and the time or manner of taking any proceedings whatsoever as a foundation for the removal of a cause on writ of error, from one federal court to another, are not required to conform to the practice of the state courts, but are regulated by federal statutes, or rules of court, or by methods derived from the common law.<sup>21</sup>

**§ 8. Proceedings Controlled by Conformity Act.**—Subject to such limitations as have been suggested, the state practice ought to be regarded as controlling the proceedings in the lower federal courts, from the filing of the petition to the

<sup>19</sup> *Northern Pac. R. R. Co. v. Paine*, 119 U. S. 561; *Scott v. Armstrong*, 146 U. S. 499.

<sup>20</sup> *Mechanical, Etc., Co. v. Castleman*, 215 U. S. 437.

<sup>21</sup> *Ex parte Chateaugay Iron Co.*, 128 U. S. 544; *St. Clair v. U. S.*, 154 U. S. 1. c. 153; *Lincoln v. Power*, 151 U. S. 436; *Hudson v. Parker*, 156 U. S. 1. c. 281.

final rendition of judgment therein; including the forms of action;<sup>22</sup> the capacity and joinder of the parties;<sup>23</sup> the mode of service of process;<sup>24</sup> the order, joinder and forms of pleadings;<sup>25</sup> the scope and sufficiency of pleadings;<sup>26</sup> the method of objecting to the jurisdiction;<sup>27</sup> the manner, effect and admissibility of defenses;<sup>28</sup> the allowance of amendments (though this should be taken, to some extent, in connection with the federal statute respecting amendments);<sup>29</sup> the motion to nonsuit or direct a verdict, or demurrer to evidence;<sup>30</sup> the form and effect of verdicts;<sup>31</sup> the power to render judgment for or against one or more plaintiffs, as for or against one or more defendants;<sup>32</sup> being some of the matters held by the Supreme Court to be within the provisions of the conformity act.

It is, however, with respect to the manner in which the parties are required or permitted to formulate and present to the court their claims and defenses, that the act seems to be treated with most respect by the federal courts. Indeed, its passage was due to the widespread adoption of the Code of Civil Procedure and the desire to do away with the modified common-law pleadings generally in force in the federal courts.

Considerable play is unfortunately left with respect to de-

<sup>22</sup> *Phillips, Etc., Co. v. Seymour*, 91 U. S. 655; *Lowndes v. Huntington*, 153 U. S. 1; *Vance v. Vandercook Co.*, 170 U. S. 468; *Indianapolis, Etc., R. R. Co. v. Horst*, 93 U. S. 291.

<sup>23</sup> *Delaware County v. Diebold*, 133 U. S. 473; *Albany, Etc., Co. v. Lundberg*, 121 U. S. 451; *Arkansas, Etc., Co. v. Belden*, 127 U. S. 379.

<sup>24</sup> *Amy v. Watertown*, 130 U. S. 301.

<sup>25</sup> *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Glenn v. Sumner*, 132 U. S. 152.

<sup>26</sup> *Glenn v. Sumner*, 132 U. S. 152.

<sup>27</sup> *Southern Pac. Co. v. Denton*, 146 U. S. 1. c. 209.

<sup>28</sup> *Roberts v. Lewis*, 144 U. S. 653; *Robertson v. Perkins*, 129 U. S. 233.

<sup>29</sup> *West v. Smith*, 101 U. S. 263; *Henderson v. Louisville, Etc., R. R. Co.*, 123 U. S. 61.

<sup>30</sup> *Central Transp. Co. v. Pullman*, 139 U. S. 24; *Coughran v. Bigelow*, 164 U. S. 301.

<sup>31</sup> *Bond v. Dustin*, 112 U. S. 604; *Glenn v. Sumner*, 132 U. S. 152.

<sup>32</sup> *Sawin v. Kenny*, 93 U. S. 289.

tails (which are and always will be the determining factor in real lawsuits) to judicial discretion.

That discretion is usually exercised in the first place by enactment of local rules, which adopt the general characteristics of state pleading and practice, rejecting such subordinate portions thereof as are deemed unwise or unsuitable tools for the federal workshop. When once adopted, these rules are not *ipso facto* changed by the change of state laws and decisions.<sup>33</sup>

With respect to a great many details of practice for which it might be impracticable to provide by rules of reasonable length, I assume that the particular federal court would accept or reject the state practice as suitable or unsuitable as the instance arose being controlled as in other matters by superior federal authority.<sup>34</sup>

§ 9. **Evidence—Competency of Witnesses.**—The nature and principles of the law of *evidence* in civil suits at law, as well as the rules relating to the competency of witnesses, are drawn by the district courts from the laws of the state wherein the action is tried, except as otherwise required by federal statutes.<sup>35</sup> It is provided by Section 721 of the Revised Statutes as follows:

“The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.” This has always been construed as requiring the courts of law of the United States, in cases outside the exception stated, to observe as canons of decision, the rules of evidence applicable to such cases by the laws of the state. The evidence which shall be sufficient to establish a particular right is regarded as being so intimately associated with the

<sup>33</sup> Railroad Co. v. Gokey, 210 U. S. 155; Shepard v. Adams, 168 U. S. 116; Chicago Board, Etc., v. Hammond, 198 U. S. l. c. 434.

<sup>34</sup> Cf. St. Charles v. Stookey, 154 Fed. l. c. 778; and cases cited under Sec. 5 of this lecture.

<sup>35</sup> Conn. Mutual, Etc., Co. v. Union Trust Co., 112 U. S. 250.

presumed existence, under given circumstances, of the right itself as to render impracticable the observance of the state laws with respect to the substance of the right, without giving effect also to the state laws fixing the elements out of which the right is deemed to arise.<sup>36</sup>

It is further provided by Section 858 as follows:

“The competency of a witness to testify in any *civil* action, suit or proceedings in the courts of the United States shall be determined by the laws of the state or territory in which the court is held.”

The laws of a state respecting evidence are construed as including not only the statutes of the state, but also the decisions of the highest state courts.<sup>37</sup>

**§ 10. Mode of Proof—Depositions—Physical Examination.**—The rules as to the examination of witnesses and the manner of taking their testimony are not governed by the foregoing statutes. It is provided by Section 862 of the Revised Statutes as follows:

“The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.”

The words “except as hereinafter provided” in the foregoing statute refer to the taking of testimony by deposition, as immediately thereafter provided for by federal statute. Depositions may be taken under Section 863 of the Revised Statutes in civil causes, where the witness (1) lives at a greater distance from the place of trial than one hundred miles; or (2) is bound on a voyage to sea; or (3) is about to go out of the United States, or (4) is about to go out of the district of trial and to a greater distance than one hundred miles from the place of trial; or (5) when he is ancient and infirm. When so taken, they are called depositions *de bene esse*, and can

<sup>36</sup> *McNiel v. Holbrook*, 12 Pet. 1. c. 89.

<sup>37</sup> *Nashua Bank v. Anglo, Etc., Co.*, 189 U. S. 1. c. 228; *Gormley v. Clark*, 134 U. S. 338; Cf. however, *Chicago, Etc., R. R. Co. v. Kendall*, 167 Fed. 1. c. 66.



§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

only be read at the trial in the event the witness is dead, out of the United States, a greater distance than one hundred miles from the place of trial, or by reason of infirmity or imprisonment cannot appear at court.<sup>38</sup>

They may also be taken under Section 866, in any cases where necessary to prevent a failure or delay of justice, under a commission granted by the court called a *dedimus potestatem*. The allowance of this writ and the reading of depositions thereunder are not conditioned by the circumstances required in the statute for depositions taken *de bene esse*.<sup>39</sup>

Provision is also made by this section for the taking of depositions, according to the usages of chancery, *in perpetuam rei memoriam*, relating to matters that may be cognizable in any court of the United States.<sup>40</sup>

With the equity jurisdiction, in the last-mentioned regard, I must assume that you are familiar. Provision has latterly<sup>41</sup> been made for taking depositions in the manner prescribed by state laws; but this refers to the form and manner of taking, and does not enlarge the right to take, as established by the foregoing statutory provisions.<sup>42</sup> It may be especially remarked that the practice so prevalent in personal injury cases of taking the deposition of the plaintiff in advance of the trial, in order to discover the nature of his case, is not permitted in the federal courts, except where the instance falls within the foregoing provisions of the federal law.

As a matter of common law or usage, the courts of the United States have no power or authority to compel a plaintiff in advance of the trial in a personal injury case, to submit his body to the inspection and examination of the adverse side.<sup>43</sup>

<sup>38</sup> R. S. 865.

<sup>39</sup> Cf. *Sergeant's Lessee v. Biddle*, 4 Wheat. 508; *Zych v. American Car Co.*, 127 Fed. 723; R. S. 866.

<sup>40</sup> Cf. *Westinghouse, Etc., Co. v. Electric Co.*, 170 Fed. 430.

<sup>41</sup> (1892) 27 Stat. 7.

<sup>42</sup> *National Cash, Etc., Co. v. Leland*, 94 Fed. 502; Cf. *Hanks v. International, Etc., Co.*, 194 U. S. 1. c. 308.

<sup>43</sup> *In re Fisk*, 113 U. S. 713; *Union Pac. R. R. Co. v. Botsford*, 141 U. S. 250; *Hanks v. International, Etc., Co.*, 194 U. S. 303.

Where, however, a valid state statute confers the right to have such physical examination, it may be regarded as akin to substantive right, and will be enforced by the federal courts sitting in that state.<sup>44</sup>

Protest has been justly uttered against refusing to allow such a substantive right, when created by a settled course of state decision.<sup>45</sup>

But if the state statutes be so drawn as to require such physical examination to be *a part of the taking of plaintiff's evidence* before the trial, it is in conflict with the federal statutes regulating the taking of evidence, and will be disregarded.<sup>46</sup>

**§ 11. Order of Proof — Cross-Examination Confined to Direct.**—With respect to the mode of examination, and the order of the production of the evidence, they are matters which are properly not substantive, but relate merely to the practice of the court.<sup>47</sup>

Being matters of practice, it would seem that under the plain language of the Act of Conformity, they should correspond, "as near as may be" to the state practice in similar cases. Especially is this true in view of the fact that the conformity act as originally enacted contained the proviso "that nothing herein contained shall alter the rules of evidence under the laws of the United States," and this proviso was omitted when the act was transferred into the Revised Statutes.

They have, however, never been so treated in the actual usages of the federal courts. No matter what the state rule may be, I understand it to be the established practice in the federal courts that a party has no right to cross-examine a witness, without leave of court, as to any facts or circumstances not connected with matters brought forth in his direct examination; but if he desires to interrogate the witness as to

<sup>44</sup> Camden R. R. Co. v. Stetson, 177 U. S. 172.

<sup>45</sup> Cf. Chicago, Etc., R. R. Co. v. Kendall (concurring opinion), 167 Fed. 62.

<sup>46</sup> Hanks v. International, Etc., Co., 194 U. S. 303.

<sup>47</sup> Wills v. Russell, 100 U. S. 621.

such matters, he must make the witness his own by calling him at an appropriate stage of the trial.<sup>48</sup>

To this general rule there are at least two exceptions, namely, questions (1) to show bias or prejudice in the witness and (2) to lay a foundation for prior contradictory statements.<sup>49</sup>

It is likewise the general rule that the re-direct examination should be confined to the matters brought out by cross-examination.<sup>50</sup> In matters of this sort, it seems to me that more weight might well be given to the discretion of the trial court, under particular circumstances, than is sometimes done in this circuit.

§ 12. **Production of Books and Papers—Subpoena Duces Tecum.**—It is further provided by Section 724 of the Revised Statutes that “in the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery;” and judgment as of non-suit or by default, as against plaintiff or defendant respectively is provided for the punishment of contumacy. There has been considerable conflict between the lower federal courts as to whether this section authorized the compulsory production of such books and papers for inspection and examination before the trial; but it is now settled by the decisive voice of the Supreme Court that the words “in the trial” mean the same as “at” or “upon the trial,” and that production prior to the trial cannot hereunder be compelled.<sup>51</sup>

<sup>48</sup> Harrold v. Oklahoma, 169 Fed. 47; McKnight v. U. S., 122 Fed. 926; Hales v. Michigan, Etc., Co., 200 Fed. 533; Resurrection, Etc., Co. v. Fortune, Etc., Co., 129 Fed. 668; Ill. Cent. R. R. Co. v. Nelson, 212 Fed. 1. c. 74; Aeolian Co. v. Standard, Etc., Co., 176 Fed. 811; O'Connell v. Pennsylvania Co., 118 Fed. 989; Foster v. U. S., 178 Fed. 165.

<sup>49</sup> Wills v. Russell, 100 U. S. 621.

<sup>50</sup> Ballew v. U. S., 160 U. S. 187.

<sup>51</sup> Carpenter v. Winn, 221 U. S. 533.

This greatly cripples the effectiveness of the section, which is probably exclusive of the state practice.<sup>52</sup>

It is further held, by the same eminent tribunal, that where the common law rule as to the incompetence of parties as witnesses is abrogated, the production at the trial of books and papers in the possession or under the control of a party may be compelled by the issuance of an ordinary *subpoena duces tecum*, just as to a person not a party; leaving to the party so subpoenaed the right to attack the process because of lack of proper scope or violation of privilege.<sup>53</sup>

**§ 13. Trial by Jury—Waiver—Peculiar Original Result.**—The right to trial by jury is preserved in all cases at law, where the value of the controversy exceeds twenty dollars by the provisions of the Seventh Amendment. It is also provided by Section 566 of the Revised Statutes that in the district courts “the trial of issues of fact, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury.” This provision was enacted in the first Judiciary Act in 1789. A practically identical provision was enacted at the same time for the circuit court, which forms the basis and essential content of Section 648 of the Revised Statutes.

Under these constitutional and statutory provisions it had been established, by the decisions of the Supreme and inferior federal courts, that the right of trial by jury in civil cases was the subject of waiver, and that this waiver might be express or implied.<sup>54</sup>

The waiver, however, had peculiar consequences. In the language of Chief Justice Taney, in a case arising in the circuit court: “. . . By the established and familiar rules and principles which govern common-law proceedings, no question

<sup>52</sup> *Kaiser v. Chicago, Etc., R. R. Co.*, 192 Fed. 1013; *Schatz v. Winton*, 197 Fed. 777.

<sup>53</sup> *American Lithograph Co. v. Werckmeister*, 221 U. S. 603.

<sup>54</sup> Cf. *Kearney v. Case*, 12 Wall. 275; *Richmond v. Smith*, 15 Wall. 429; *Supervisors v. Kennicott*, 103 U. S. 554.

§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

of law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings or judgment in the cause) unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts and referring the questions of law to the court." . . . "The finding of issues in fact by the court upon the evidence is altogether unknown to a common law court, and *cannot be recognized as a judicial act*. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted to the judge for decision upon the evidence, *he does not exercise judicial authority in deciding*, but acts rather in the character of an *arbitrator*. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled and the exception reserved while they were still at the bar. The statute which gives the exception, in a trial at common law, gives it only in such cases. And as this Court cannot regard the facts found by the judge, *as having been judicially determined* in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the circuit court has jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."<sup>55</sup>

The same rule applied to the district courts.<sup>56</sup>

<sup>55</sup> Campbell v. Boyreau, 21 How. 1. c. 226; Cf. Kelsey v. Forsyth, 21 How. 85.

<sup>56</sup> Guild v. Frontin, 18 How. 135.

§ 14. **Written Waiver by Statute—Arbitrators—Auditors—Statutory Reference.**—Such being the state of the law, Sections 649 and 700 of the Revised Statutes were enacted, reading respectively as follows:

“Sec. 649. Issues of fact in civil cases in *any circuit court* may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record *file with the Clerk a stipulation in writing* waiving a jury. The finding of the Court upon the facts, which may be general or special, shall have the same effect as the verdict of a jury.”

“Sec. 700. When an issue of fact in any civil case *in the circuit court* is tried by the court without the intervention of a jury, according to Section 649, the rulings of the court in progress of the trial of the cause, if excepted to at the time, and duly presented in a bill of exceptions, may be reviewed . . . upon a writ of error or appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts to support the judgment.”

By its terms, Section 649 has reference only to the circuit courts, and it was properly interpreted as having no reference to the district courts, where the effect of the waiver remained the same as before.<sup>57</sup>

With respect to the circuit court, the intention of the section was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. The statute being in derogation of the common-law practice previously established, is construed as having this intended effect only when its terms are exactly complied with; and it is accordingly held that in order to take advantage of its terms, there must be a stipulation in writing and it must be filed with the clerk.<sup>58</sup> Otherwise the superior court, upon writ of error, will not undertake to revise the proceedings of the lower court upon the admission or rejection of testimony

<sup>57</sup> *Rogers v. U. S.*, 141 U. S. 548.

<sup>58</sup> *County of Madison v. Warren*, 106 U. S. 622; *Kearney v. Case*, 12 Wall. 275; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Shipman v. Mining Co.*, 158 U. S. 356.

§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

or upon any other question of law growing out of the evidence.<sup>59</sup>

Under the provisions of Section 291 of the Judicial Code, any powers or duties conferred upon the circuit courts, by statutes not included in that act, are to be deemed and held as conferred upon the district courts. Under this statute, I am of the opinion that the power to try a cause without a jury upon written stipulation as provided by Section 649, now extends to all the civil jurisdiction of the district courts as now established; and I do not believe that the courts will hold that we must still keep separate the old distinctions of jurisdiction between the circuit and district courts, for the purpose of applying Sections 566 and 649 thereto.<sup>60</sup>

I do not understand that the foregoing provisions were intended, or have had the effect, to destroy the power of the parties to consent to a finding of the facts by arbitrators or referees, and the entry of judgment on their award;<sup>61</sup> nor to destroy the inherent power of the court, under proper circumstances, to appoint an auditor to state a complicated account for the better understanding of the jury.<sup>62</sup> Whether under the conformity statute, *and where the parties consent*, the case may be referred to a referee for his conclusions of law and fact, in accordance with the procedure *and methods of review* prescribed by state statute, seems to me to be unsettled; although the Eighth Circuit may be said now to lean strongly toward that practice.<sup>63</sup>

<sup>59</sup> *Bond v. Dustin*, 112 U. S. 604.

<sup>60</sup> Cf. *Nashville, Etc., Co. v. Barnum*, 212 Fed. 634.

<sup>61</sup> *York, Etc., Co. v. Myers*, 18 How. 246; *Hecker v. Fowler*, 2 Wall. 123; *Newcomb v. Wood*, 97 U. S. 581; *Shipman v. Mining Co.*, 158 U. S. 356; *Swift v. Jones*, 145 Fed. 489; *Boatmen's Bank v. Trower*, 181 Fed. 804; *U. S. v. Ramsey*, 158 Fed. 488.

<sup>62</sup> *Craven v. Clark*, 186 Fed. 959; *Fenno v. Primrose*, 119 Fed. 801.

<sup>63</sup> *Lupton v. Automobile Club*, 225 U. S. 489; *Boogher v. N. Y. Life Ass'n*, 103 U. S. 90; *Boatmen's Bank v. Trower*, 181 Fed. 809; *St. Louis, Etc., Co. v. Edison Co.*, 64 Fed. 997; *Swift v. Jones*, 145 Fed. 489; *U. S. v. Wells*, 203 Fed. 146; *U. S. v. Ramsey*, 158 Fed. 488; *Paine v. Standard, Etc., Co.*, 203 Fed. 242; *Alder v. Edenborn*, 198 Fed. 928; *Tiernan v. Chicago Ins. Co.*, 214 Fed. 238; *Philadelphia, Etc., Co. v. Fechheimer*, 220 Fed. 401; *Delaware, Etc., Co. v. Carboni*, 223 Fed. 631.

§ 15. **Jury—Composition—Direction of Verdict—Judgment Non Obstante.**—The “jury” referred to in the constitution and statutes means that body of twelve men who constituted the common-law jury,<sup>64</sup> and their unanimous concurrence is an essential element.<sup>65</sup> The constitutional provision applies to territory incorporated within and forming part of the United States,<sup>66</sup> but not to such as is not annexed to or incorporated with this country.<sup>67</sup> The qualification and exemptions of jurors are the same as in the highest court of law in the particular state.<sup>68</sup> The jurors are drawn from a box containing at least three hundred names, placed therein by the clerk of the court and an appointed commissioner, and are to be returned from such parts of the district as the Court shall direct, to secure impartiality and save expense.<sup>69</sup>

Talesmen may be returned from bystanders.<sup>69a</sup> Special juries are to be returned by the marshal in the same manner as required in such cases by the laws of the state.<sup>70</sup> No person may serve as a petit juror in any district court oftener than once a year, and summons and attendance as such within one year is made a ground of challenge for cause.<sup>71</sup>

In all civil cases, but three peremptory challenges are allowed to each side, regardless of the number of plaintiffs or defendants.<sup>72</sup> All challenges are tried by the Court.<sup>73</sup>

In spite of the provisions for trial by jury, no rule is better established in the federal courts than that which permits the

<sup>64</sup> *Thompson v. Utah*, 170 U. S. 343.

<sup>65</sup> *American Publ. Co. v. Fisher*, 166 U. S. 464; *Springville City v. Thomas*, 166 U. S. 707; *Maxwell v. Dow*, 176 U. S. 1. c. 586.

<sup>66</sup> *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1.

<sup>67</sup> *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138; *Dowdell v. United States*, 221 U. S. 325.

<sup>68</sup> J. C., Sec. 275.

<sup>69</sup> J. C., Secs. 276, 277.

<sup>69a</sup> J. C., Sec. 280.

<sup>70</sup> J. C., Sec. 281.

<sup>71</sup> J. C., Sec. 286.

<sup>72</sup> J. C., Sec. 287.

<sup>73</sup> *Ibid.*



judge to direct a verdict in favor of one of the parties, when the testimony and all the inferences therefrom which could justifiably be drawn are insufficient to support a different verdict; and wherever the Court would feel bound to set aside a verdict for want of testimony to sustain it, it may direct a verdict, without putting the parties to the expense of a new trial. When properly raised, the question as to whether there is sufficient evidence to sustain a verdict is one of law.<sup>74</sup> It has, however, been recently ruled that a federal court cannot, after verdict, render judgment *non obstante veredicto*, because of insufficiency of the facts proven, consistently with the provision for jury trial.<sup>75</sup>

In the case of *Buetell v. Magone*,<sup>76</sup> Chief Justice White was confronted with a case wherein, at the close of all the testimony, each side requested the Court to direct a verdict in its favor. The Court thereupon directed the jury to find for defendant. The Chief Justice, in deciding the cause on error, used the following language: "As, however, both parties asked the Court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. *This was necessarily a request that the Court find the facts*, and the parties are therefore concluded by the finding made by the Court, upon which the resulting instruction of law was given. The facts having been thus submitted to the Court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm, if there be any evidence in support thereof."

In other words, if one side requests the Court to declare, *as a matter of law*, that there is no evidence warranting judgment against him, but that all the evidence requires judgment in his favor, and so nothing to submit to the jury, and the adversary side makes, without any concert of action, the same request, the whole case becomes one of *fact*,

<sup>74</sup> *McGuire v. Blount*, 199 U. S. 142; *Bowditch v. Boston*, 101 U. S. 16; *Schuchardt v. Allen*, 1 Wall. 359; *Parks v. Ross*, 11 How. 362.

<sup>75</sup> *Slocum v. Insurance Co.*, 228 U. S. 364.

<sup>76</sup> 157 U. S. 154.

and if there be *any* evidence on either or both sides, the Court's direction of a verdict is conclusive. This is a very remarkable result, and has subsequently been explained in the case of *Empire State Cattle Company v. Atchison, T. & S. F. R. Company*.<sup>77</sup> It was there held that the Buetell case was confined to a situation where both parties requested a peremptory finding and did nothing more; and was not intended to deprive either party of the right to ask other special instructions. In other words, as I understand the matter, the rule in the Buetell case only applies where both parties stand upon their requests for a directed verdict. Upon logical grounds, which I shall not attempt to set forth, even this rule seems of doubtful and difficult defensibility, although it is supported by the practice in some states.

**§ 16. Charge of Court—Exceptions Should be Specific.**  
—As heretofore indicated, state statutes and constitutional provisions cannot prevent a federal judge from commenting on the evidence, and expressing his opinion on the facts, provided it be done on a proper occasion and in a judicial manner, and all matters of fact are ultimately left to the decision of the jury.<sup>78</sup> Unquestionably this privilege is subject, like every other discretionary power, to abuse; but I am of the opinion that nothing can be less calculated to enlighten the average member of a city jury, upon what are the real issues, than the long and involved instruction invariably offered by the plaintiff as a basis for recovery of a verdict, and the short and detailed propositions offered by the defendant. The power of the Court, in simple, every-day language, to direct the attention of the jury to what is really salient, seems to me to be an essential, as it is an historical part, of the jury system. There is an important difference between the practice in this and many other states, and that in vogue in the federal courts with respect to the method of objecting to the

<sup>77</sup> 210 U. S. 1.

<sup>78</sup> *Vicksburg, Etc., R. R. Co. v. Putnam*, 118 U. S. 545; *St. Louis, Etc., R. R. Co. v. Vickers*, 122 U. S. 360; *California Ins. Co. v. Compress Co.*, 133 U. S. 387.

instructions given by the court. In this state, for example, we object generally to the giving of each and every instruction and exception thereon is good. We, thereupon, take a microscope and spend the next two weeks in endeavoring to find some place wherein the statements of law are inaccurate, and therefore must have misled the jury.

It is provided by the rules of the Supreme Court (Rule 4, cl. 1) and by the rules of the Circuit Court of Appeals (Rule 10) that "the party excepting shall be required to state distinctly the several matters of law in (the) charge to which he excepts; and *those* matters of law, and *those only*, shall be inserted in the bill of exceptions and allowed by the court." The part of the charge to which the exception is taken must be so distinctly pointed out as to call the attention of the judge to the error complained of, and afford opportunity for its correction.<sup>79</sup>

It is repeatedly laid down that a general exception to the whole charge will be unavailing, where it contains several propositions, *and any of them are correct*.<sup>80</sup> While it is not easy to find cases so stating, I assume, in spite of court rules, that where every proposition in a charge is erroneous, a general exception will avail; this being the mere converse of the foregoing statement. The purpose back of the general rule is to correct errors, if any, in instructions before the jury retires to consider its verdict.

§ 17. **Amendments.**—There are certain especial statutory provisions for amendment (not alone applicable to law cases) which do not exclude totally the operation in that regard of the Conformity Act, but, so far as law cases are con-

<sup>79</sup> Holder v. U. S., 150 U. S. 91; Block v. Darling, 140 U. S. 234; Jones v. East Tenn., Etc., R. R. Co., 157 U. S. 682; Allis v. U. S. 155 U. S. 117; Beaver v. Taylor, 93 U. S. 46; Burton v. West Jersey, Etc., Co., 114 U. S. 474; Mobile, Etc., R. R. Co. v. Jurey, 111 U. S. 584; McCabe v. Wilson, 209 U. S. 275.

<sup>80</sup> Johnston v. Jones, 1 Black. 209; Beaver v. Taylor, 93 U. S. 46; Anthony v. Louisville, Etc., R. R. Co., 132 U. S. 172; Baltimore, Etc., R. R. Co. v. Mackey, 157 U. S. 1. c. 91; Norfolk, Etc., R. R. Co. v. Earnest, 229 U. S. 114; Holloway v. Dunham, 170 U. S. 615.

cerned, should, I think, be considered as conferments of supplemental authority upon the federal courts. Thus it is provided by Section 948 of the Revised Statutes that the district court may, at any time, in its discretion, and upon just terms, allow an amendment of any process returnable before it, where the defect has not prejudiced and the amendment will not injure the party against whom such process has issued. It is further provided by Section 954 that “no summons, writ, declaration, return, process, judgment or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of *form*; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; *and may at any time permit either of the parties to amend any defect in the process or pleadings*, upon such conditions and upon such terms as it shall, in its discretion and by its rules, prescribe.” Without undertaking to cite manifold authorities, I believe it may be stated that these powers have been exercised habitually by the federal courts in the same liberal spirit in which they were conceived.<sup>81</sup>

§ 18. **Attachments—Executions.**—It is further provided by Section 915 of the Revised Statutes that in common-law causes the district courts shall afford to the plaintiff similar remedies, by attachment or other process, against the property of the defendant, “are *now* provided” by the laws of the state; and the court is further authorized from time to time, by general rules, to adopt such state laws as may be in force relating thereto. This act was passed in 1872, to which date the word “now” as used in the statute has reference. Unless, therefore (as practically all federal courts have done),

<sup>81</sup> Cf. *Parks v. Turner*, 12 How. 39; *McDonald v. Nebraska*, 101 Fed. 171.

§ 19 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

a rule has adopted later state laws, the procedure in attachment is governed by the law as it stood at that time. It is unnecessary to recite the authorities heretofore referred to, holding that a federal court, by reason of other limitations upon its jurisdiction, cannot maintain attachment proceedings, without personal service in the district or voluntary appearance of the defendant.

The same act of 1872 entitles the party recovering judgment in a common-law court to similar remedies upon the same, by way of execution or otherwise, as “are *now* provided” in like causes by the laws of the state; and similar power is conferred to adopt by rule the provisions of future laws, which has usually been availed of.<sup>82</sup> These two sections are a part of the same purpose manifested in Section 914, to bring about general uniformity of practice in such matters between state and federal courts.

**§ 19. Stay of Execution—Motion for New Trial—Abuse of Discretion.**—In connection with this subject of executions, I must call to your attention the provisions of Section 987 of the Revised Statutes. It is there in effect provided that whenever a circuit court enters judgment in a civil action, execution may, at the discretion of the court and on proper terms for the security of the adverse party, be stayed for forty-two days from the time of entering judgment, to give time to file a petition for new trial. If such petition be filed, certified with the consent of the judge, execution is stayed as of course to the next session of the court. If a new trial be granted, the former judgment is, of course, annulled.<sup>83</sup>

This statute is not the only one under which a party may apply for a new trial. Independently thereof, and outside of the circumstances there provided for, he may apply under the provisions of Section 726, conferring power upon the court to grant a new trial upon the usual grounds, and such application is in time, in the absence of contrary rule of court,

<sup>82</sup> R. S. 916.

<sup>83</sup> Cf. *Cambuston v. U. S.*, 95 U. S. 285; *Felton v. Spiro*, 78 Fed. 576; *Rutherford v. Ins. Co.*, 1 Fed. 456.

if made during the term of court at which the judgment (or, at any rate, the verdict) was rendered.<sup>84</sup>

Contrary to frequent state practice, a motion for new trial is addressed to the sound discretion of the court, and its overruling is not ordinarily the subject of review in the appellate tribunal,<sup>85</sup> unless that discretion be plainly abused or its exercise declined.<sup>86</sup> It follows that the making of a motion for new trial would seem to be no prerequisite for review.<sup>87</sup>

<sup>84</sup> *Felton v. Spiro*, 78 Fed. 576; *Manning v. Ins. Co.*, 107 Fed. l. c. 56; *James v. Evans*, 149 Fed. l. c. 139; *Hughes v. New York, Etc., R. R. Co.*, 225 Fed. 568; *Mann v. Dempster*, 181 Fed. 76; *Sanford v. White*, 108 Fed. 928; cf. *Kingman v. Mfg. Co.*, 170 U. S. l. c. 678.

<sup>85</sup> *Henderson v. Moore*, 5 Cranch. 11; *Life Ins. Co. v. Wilson*, 8 Pet. 291; *Indianapolis, Etc., R. R. Co. v. Horst*, 93 U. S. 291; *Ayers v. Watson*, 137 U. S. 584; *Missouri, Etc., R. R. Co. v. Chicago, Etc., R. R. Co.*, 132 U. S. 191; *Manning v. Ins. Co.*, 107 Fed. 52.

<sup>86</sup> *Mattox v. U. S.*, 146 U. S. 140; *Felton v. Spiro*, 78 Fed. 576; *Higgins v. U. S.*, 185 Fed. 710.

<sup>87</sup> *Boatmen's Bank v. Trower*, 181 Fed. 804.

## **CHAPTER VIII.**

### **THE RULE OF DECISION AT LAW.**

- § 1. Conflict of Rules of Decision Between State and Federal Courts.**
- 2. General Considerations—No Federal Common Law.**
- 3. The State Courts Follow U. S. Supreme Court in Federal Matters.**
- 4. The Federal Doctrine of General Jurisprudence.**
- 5. Application of R. S. 721.**
- 6. The Basis for the Conflict.**
- 7. Rules of Comity As to State Statutory Provisions.**
- 8. Rules of Local Property.**
- 9. General Jurisprudence—What Is.**
- 10. Local Rules of Property—Examples.**

**§ 1. Conflict of Rules of Decision Between State and Federal Courts.**—The federal courts, by reason of the broad grant to them of jurisdiction, deal constantly with cases that demand for their decision the application of non-federal law. Thus a case based upon diversity of citizenship, or involving a single federal question, usually requires the application, in whole or in part, of state as distinguished from federal law. The state courts, on the other hand, are being constantly called upon to apply and interpret the constitution, laws and treaties of the United States. It is exceedingly desirable that the law should be certain, both in its principles and their application. Some of the law is written, deriving force from its positive expression, in an appropriate and formal manner, by those organs of the state to whom is committed the function of legislation. By far the greater part, however, is the unwritten or customary law, derivable in our times from the common-law and the later judicial decisions interpreting and applying it to modern conditions.

The vesting of concurrent jurisdiction in the state and federal courts suggests the possibility of disagreement between them, not only as to the interpretation of the written laws of the state or nation, but as to the general rules properly

derivable from the great mass of customary law. It would be contrary to the actual facts to assert that this conflict has been entirely avoided.

§ 2. **General Consideration—No Federal Common Law.**—Comity would suggest that the courts of the nation in dealing with rights arising under and depending from the written laws of a state should follow those laws as interpreted by the highest courts of the particular state enacting them; and that, on the other hand, the courts of a state should follow the written laws and treaties of the United States, as interpreted by the highest courts of the nation.

With respect to the unwritten law, the situation is more difficult. Strictly speaking, there is no common law of the United States, as distinct from the common law of the states;<sup>1</sup> although cases might be readily suggested as falling within the federal jurisdiction, of such a character and involving such questions as could by no possibility be submitted to the courts of a state, and for which no precise precedents could be found in the historical common law.<sup>2</sup>

Such exceptional cases in so far as they fell upon the law side of the federal courts, in accordance with the ground heretofore suggested, would be decided in the light of the principles derived from the perennial repository of the common law.

The courts of the state also deal with matters falling within the scope of national control, and (where no controlling federal statute exists) apply to them the common law as interpreted by the courts of the particular state. It has thus frequently happened for example that the terms of a contract for interstate transportation would be held valid under the principles of the common law as administered by the courts of one state and void under those of another; and there is no federal check or remedy for this situation except the enactment of a statute to secure future uniformity. (I may state

<sup>1</sup> *Western Union Tel. Co. v. Call*, 181 U. S. 1. c. 101.

<sup>2</sup> *Cf. Kansas v. Colorado*, 206 U. S. 1. c. 96, 97.



parenthetically that recent federal statutes have gone far in this direction.)<sup>3</sup>

So the courts of the United States deal with subject-matters lying within the domain of the state, as well as with those falling within the boundaries of federal power. In dealing with cases of either character (in the absence of statute) the federal courts likewise apply to them the principles of the common law, as such courts understand them to be; paying, it is true, in certain classes of cases involving legal relations under the peculiar control of the state, an almost unyielding deference to the established course of state decision.

The consideration of the equity jurisdiction, I have thought best to defer to a later lecture.

**§ 3. The State Courts Follow U. S. Supreme Court in Federal Matters.**—The rule is firmly settled, that the state courts, in the interpretation and application of the constitution; laws and treaties of the United States, are bound to follow the last and controlling decision of the Supreme Court of the United States, if any there be, upon the point in controversy.<sup>4</sup>

The necessity of such a rule is plain. The constitution and laws of the United States are not made with a view to one state, or its peculiar conditions, but for all. A federal statute cannot be said to have an established meaning, for purposes of state interpretation, until it has been construed by the Supreme Court of the United States.<sup>5</sup>

If there should be no such decision, the state court, in the exercise of its power and duty to end the dispute, would make, of necessity, its own construction for that case. In arriving at its proper construction, I assume that it would consider as very persuasive, but not as necessarily controlling, authority, the decisions of the lower federal tribunals.

<sup>3</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491.

<sup>4</sup> *Elmendorf v. Taylor*, 10 Wheat. 152; *Rothschild v. Steger*, 256 Ill. 196; *Haseltine v. Bank*, 155 Mo. 66; *Trustees v. Coppett*, 52 Ohio 567; *Lyon v. Clark*, 124 Mich. 100.

<sup>5</sup> *Calhoun v. Ajax, Etc., Co.*, 182 U. S. 1. c. 505.

§ 4. **The Federal Doctrine of General Jurisprudence.**—In interpreting and applying the laws of a *state*, whether written or unwritten, the courts of the United States can not be subjected to state supervision. The practical effect of this situation has been to engender a disposition on the part of the federal courts to adhere, under a variety of circumstances, to their own views of right and justice, although such adherence be at variance with the existing tendency of state decision.

The federal courts have always, in deciding upon the duty of conformity, drawn a sharp line between matters of *local* and of *general* law.

In so far as questions of general jurisprudence are concerned the federal courts have always held that they were bound to decide for themselves, though leaning toward an agreement with the views of the state court. It must be understood that I speak here of cases where the responsibility of original decision rests upon the federal courts, and not of cases coming to the Supreme Court upon writ of error to the state court of final jurisdiction. In cases of the latter sort, the Supreme Court confines its review to the federal rights or immunities alleged to have been infringed and cannot consider the correctness or incorrectness of the conclusions of the lower court, in so far as they are merely concerned with questions of state law, statutory or common.<sup>6</sup>

§ 5. **Application of R. S. 721.**—Of course the courts of the United States follow the constitution and statutes of a state in so far as they apply to and qualify transactions of an intra-territorial character, subject to its legislative control. The statutory law of the state is to be regarded, as to such transactions or subject-matters, as inhering in and forming (in so far as it is substantive) an essential element of the legal relation, which cannot be disregarded without altering the structure of the relation itself. This would seem to be the necessary respect due to the reserved powers of the state

<sup>6</sup> *Sauer v. New York*, 206 U. S. 536.

under a proper theory of constitutional interpretation, and to need no statutory injunction for its observance.<sup>7</sup>

It has, however, been provided since 1789 by what is now Section 721 of the Revised Statutes, that “. . . the *laws* of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

By its terms the statute is limited to trials at common law and it does not apply to proceedings in equity, or in admiralty, or to criminal offenses against the United States.<sup>8</sup>

There are some classes of state statutes which are not properly regarded as substantial at all, or do not relate to matters of state control, but are nevertheless followed and observed in the federal courts, by virtue of the foregoing statute.

We have already noted the adoption hereunder of the state rules of evidence. State statutes of limitation are held to be binding upon the federal courts of law sitting in the particular state in the absence of legislation by Congress, even as to such matters as a suit for the infringement of a patent,<sup>9</sup> or an action to enforce the statutory liability of a stockholder in a national bank.<sup>10</sup>

The statute of frauds of a state, even as applied to commercial instruments, is a law of the state within the meaning of the statute.<sup>11</sup> So with the statutes of the state, apparently, granting costs to a successful litigant;<sup>12</sup> though this seems to carry the matter a great way.

The term “*laws*,” as used in the statute is said by the Supreme Court to mean “the rules and enactments promulgated

<sup>7</sup> *Bank v. Dudley*, 2 Pet. 1. c. 525.

<sup>8</sup> *Bucher v. Cheshire R. R. Co.*, 125 U. S. 1. c. 382.

<sup>9</sup> *Campbell v. Haverhill*, 155 U. S. 610.

<sup>10</sup> *McClaine v. Rankin*, 197 U. S. 154; Cf. *O'Sullivan v. Felix*, 233 U. S. 318; *Bauserman v. Blunt*, 147 U. S. 647.

<sup>11</sup> *Moses v. Nat. Bank*, 149 U. S. 298.

<sup>12</sup> *Scatcherd v. Love*, 166 Fed. 53; *Michigan, Etc., Co. v. Aluminum, Etc., Co.*, 190 Fed. 903.

by the legislative authority—or long established *local customs* having the force of law.’’<sup>13</sup>

The *decisions* of the state courts are declared not to constitute laws, but only *evidence* of what the laws are.<sup>13a</sup>

§ 6. **The Basis for the Conflict.**—We must recall that the courts of the nation were created largely for the purpose of administering equal and unbiased justice—according to the real right and law of the matter—to those who are strangers in the courts of the state. The federal courts are co-ordinate with and not inferior to the state courts. Their commission to determine the law and their duty to declare it are of as high a nature. Presumably their judges are as intelligent, as learned, as patriotic, and as deeply imbued with the sense of grave and inevitable responsibility in administering their jurisdiction as the judges of the state. If the views of the latter should be invariably deferred to, the independent judgment of the federal courts as to the meaning and effect of state laws (to secure which was one of the objects of their creation) would be surrendered and destroyed. If, on the other hand, in any spirit of self-will or antagonism, the federal courts should show little respect or regard for a state’s construction of its own laws, we should have the unfortunate and remarkable result, that the title to much of the property in the state might be fixed in one court and ambulatory in the other.

The indirect result would be, as it seems to me, to invade the reserved powers of the states, guaranteed to them by the constitution, through the agency of the federal judiciary. The situation is difficult, at the very best.

A question involving the constitutional validity, due enactment or true meaning of a state statute may arise under a variety of circumstances. For example, it may be presented to a federal court: (a) as *res integra*, without any existing prior construction; (b) after one or more consistent or conflicting federal interpretations with or without one or more

<sup>13</sup> Cf. *Swift v. Tyson*, 16 Pet. 1; *Brooklyn, Etc., R. R. Co. v. Bank*, 102 U. S. 14.

<sup>13a</sup> *Ibid.*

subsequent or prior state decisions to the contrary, and the transaction may have antedated all the decisions, come between federal and state decisions, or been subsequent to them all; (c) with no federal decisions, either of a co-ordinate or controlling court; and one or more consistent or conflicting state decisions rendered either subsequent or prior to the transaction in issue; (d) when the state decisions were consistent prior to the transaction and as such followed by federal authorities but have since been modified and overruled by one or more subsequent state decisions; or (e) where the state decisions are confused and entirely unsettled.

These and perhaps other conceivable situations might arise where the matter concerned the *local* rules of property or *general* jurisprudence, and involved contractual or non-contractual relations.

In the interpretation of "established local customs having the force of law" by which is generally understood the customary or unwritten law affecting things of a fixed or local nature, within the state,<sup>14</sup> there is further opportunity for discord.

We have advanced so far as a people that the inhabitants of no state as a body can be said to have any fixed or definite consciousness, apart from written monument or judicial decision, of obligatory custom as a source of law. The great body of customary law is, in most states, the common law of England as found in the English reports and statutes, and in the reported decisions of the state courts.

An ample supply of materials is thus provided for chaos in the decisions of co-ordinate and independent courts.

**§ 7. Rules of Comity as to State Statutory Provisions.—** Generally speaking, it seems to me that the federal courts will usually observe the following rules in passing upon state statutes and constitutional provisions.

These rules are in no wise exhaustive; but an attempt at exhaustive codification would result in confusion as well as prolixity. The statement given is not always to be found in

<sup>14</sup> *Swift v. Tyson*, 16 Pet. 1. c. 18.

terms in the citations; but is a derivation from many cases, in some of which exceedingly loose language is sometimes found. It may be stated with accuracy, that the attitude of the Supreme Court, during the first fifty years of its existence, was much more liberal toward the states than at any time thereafter; and it is further remarkable, that no judge was more urbane in inclination toward agreement with state decision than Chief Justice Marshall.

(1) When administering state laws, and determining rights accruing under them, the jurisdiction of the federal court is an independent one—not subordinate to, but co-ordinate and concurrent with the jurisdiction of the state courts.<sup>15</sup>

(2) Neither the statute nor the respect due to the sovereignty of the state binds the federal courts to follow the decisions of the state courts, in matters involving the construction or application of the constitution, laws or treaties of the United States.<sup>16</sup>

(3) A federal court will not pass upon the validity of a state statute, under the state constitution, in advance of the highest court of the state, unless the case presented imperatively demands it.<sup>17</sup>

(4) State decisions, to be binding, should be in the state court of last resort.<sup>18</sup>

(5) State decisions, to be binding, should be upon the precise point, which was actually presented for adjudication to the state court.<sup>19</sup>

<sup>15</sup> *Burgess v. Seligman*, 107 U. S. 20; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349.

<sup>16</sup> *Re Tyler*, 149 U. S. l. c. 187; *Bank v. Llewellyn*, 187 Fed. 16; *In re Monongahela Distillery Co.*, 186 Fed. 220. This rule is the converse of that stated *supra*, in Sec. 3 hereof; but it is astonishing to find how seldom it has been stated, owing to its obvious character.

<sup>17</sup> *Pelton v. Bank*, 101 U. S. 143; *Michigan, Etc., R. R. Co. v. Powers*, 201 U. S. 245; *Cf. Pullman Co. v. Knott*, 235 U. S. 23.

<sup>18</sup> *Beals v. Hale*, 4 How. 37, l. c. 54; *Anglo-American, Etc., Co. v. Lombard*, 132 Fed. l. c. 741; *U. S. Tel. Co. v. Central, Etc., Co.*, 202 Fed. 66.

<sup>19</sup> *Carroll v. Carroll*, 16 How. 275; *Roberts v. Bowles*, 101 U. S. 119; *St. Louis, Etc., R. R. Co. v. Terre Haute Co.*, 145 U. S. 393.

(6) In all cases requiring the construction of a state statute or constitution, where the question is balanced with doubt, the federal courts will lean toward agreement with the highest court of the state; and this is especially true where a rule of local property or matters of internal government are concerned.<sup>20</sup>

(7) Where the construction of a statute or constitutional provision has been established or settled, by a course of state decision existing at the time of the contract or transaction, and remaining unchanged, that construction will be treated as a part of the statute and followed by the federal courts; and this is especially noticeable where the decisions constitute a rule of local property, or concern matters of internal polity.<sup>21</sup>

(8) Where a contract is involved and the construction of the highest court of the state at the time the contract was entered into was in favor of the validity, and such meaning of the statute as would support the contract, such decision or decisions of the state court will be assimilated to a law of the state, and be considered as entering into the contract; and in a suit *brought* in or removed for trial to the federal courts will be adhered to and applied, although in the meantime the state courts have repudiated their former holding.<sup>22</sup>

<sup>20</sup> *Burgess v. Seligman*, 107 U. S. 20; *Amy v. Watertown*, 130 U. S. 301; *Forsyth v. Hammond*, 166 U. S. 506; *Warburton v. White*, 176 U. S. 484; *Board v. Wilder*, 179 U. S. 622; *Yazoo, Etc., R. Co. v. Adams*, 181 U. S. 580; *Messenger v. Anderson*, 225 U. S. 436; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349; *Flanigan v. Sierra County*, 196 U. S. 553; *Great Southern Co. v. Jones*, 193 U. S. 532; *O'Brien v. Wheelock*, 95 Fed. 883; *Milwaukee, Etc., R. R. Co. v. R. R. Commission*, 238 U. S. 174.

<sup>21</sup> *Webster v. Cooper*, 14 How. 488; *Fairfield v. Gallatin County*, 100 U. S. 47; *Burgess v. Seligman*, 107 U. S. 20; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Merriweather v. Muhlenberg County*, 120 U. S. 354; *Warburton v. White*, 176 U. S. 484; *Sioux City, Etc., Co. v. Trust Co.*, 173 U. S. 99.

<sup>22</sup> *Gelpecke v. Dubuque*, 1 Wall. 175; *Havermeyer v. Iowa County*, 3 Wall. 294; *Olcott v. Supervisors*, 16 Wall. 678; *Douglass v. Pike County*, 101 U. S. 677; *Bolles v. Brimfield*, 120 U. S. 759; *Loeb v. Columbia Township*, 179 U. S. 472; *Wilkes County v. Coler*, 180 U. S. 506; *Taylor v. Ypsilanti*, 105 U. S. 60.

(9) Where rights have accrued under the state statute or constitutional provision, before its construction was settled and established by state decision, it is not only the right, but the duty of the federal courts to exercise their own judgment, just as they do in questions of general jurisprudence; leaning toward harmony with, but not feeling bound by the state decisions existing at the time of the hearing.<sup>23</sup>

(10) If there be any inconsistency in state decisions, the general rule is that the federal courts will follow the latest *settled* adjudications.<sup>24</sup>

(11) The federal courts will usually accept the decision, under all circumstances, of the highest state court as to whether a state law was passed in accordance with the forms and ceremonies prescribed by the state constitution. This holding is illogical. Why this phase of the validity of a state law upon which rights depend is more immune from federal scrutiny than any other phase of unconstitutionality does not appear.<sup>25</sup>

§ 8. **Rules of Local Property.**—With respect to local customary law, by which I understand to be meant usages or customs bearing upon the rights and titles to real estate and other things and rights immovable in their nature,<sup>26</sup> I have already pointed out that for practical purposes the state courts are the organs through whom is voiced and interpreted in such matters the legal consciousness of their people.

Where the customary, as distinguished from the statutory, law of a state has been settled and established with reference to such matters by state decisions, which have become a local rule of property, existing at the time of the transaction in

<sup>23</sup> *Burgess v. Seligman*, 107 U. S. 20; *Folsom v. Township*, 159 U. S. 611; *Great Southern Hotel Co. v. Jones*, 193 U. S. 532; *Stanley County v. Coler*, 190 U. S. 437; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349.

<sup>24</sup> *Green v. Neal's Lessee*, 6 Pet. 291; *Wade v. Travis County*, 174 U. S. 499.

<sup>25</sup> *South Ottawa v. Perkins*, 94 U. S. 260; *Stanley County v. Coler*, 190 U. S. 437; *Jones v. Great Southern Hotel Co.*, 193 U. S. 532; *Peters v. Gilchrist*, 222 U. S. 483.

<sup>26</sup> *Swift v. Tyson*, 16 Pet. l. c. 18.



question, those decisions will be followed by the courts of the United States, in quite the same fashion (and subject to the same limitations so far as applicable) as the decisions with respect to the statutory law.<sup>27</sup>

I see no reason why there cannot be a settled rule of local property with respect to the transfer of property of a personal character, where the property is situated in a state, and is transferred in accordance with a long and established line of state decisions, though no statute exist; and apart from the somewhat indefinite line which separates general or commercial jurisprudence from local matters, this statement can be supported by a number of decisions.<sup>28</sup>

The question is pertinent as to when or under what circumstances a state construction or holding is to be regarded as settled or established, or as a rule of property. The final answer to this question must be found, essentially, in the conviction of the particular federal court. A number of decisions in point, extending over a considerable period of time, would certainly be regarded as sufficient and binding. A single decision, particularly of recent origin, might be regarded as insufficient to conclude the question;<sup>29</sup> but if it contained intrinsic evidence of careful and deliberate consideration,<sup>30</sup> and especially if it were acquiesced in for a considerable period by the legislature, and the bar, it seems to me it ought to be regarded as binding. With respect to the construction of statutes, the federal courts are liberal in following a single construction by the highest state court, where the point was squarely in issue, and there are no conflicting adjudications or unsettling intimations; especially where such construction was in force at the time of the transaction affected.

<sup>27</sup> Cf. *Burgess v. Seligman*, 107 U. S. 20; *Jackson v. Chew*, 12 Wheat. 153; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349.

<sup>28</sup> Cf. *Thompson v. Fairbanks*, 196 U. S. 516; *Dooley v. Pease*, 180 U. S. 126; *Etheridge v. Sperry*, 139 U. S. 266; *Boyce v. Tabb*, 18 Wall. 546.

<sup>29</sup> Cf. *Gibson v. Lyon*, 115 U. S. 439; *Snare v. Friedman*, 169 Fed. 1.

<sup>30</sup> Cf. *Northern Pac. Co. v. Meese*, 239 U. S. 614.

To constitute a rule of property in the absence of any statute a *course* of decision or long settled acquiescence in a leading case might be justly required.

§ 9. **General Jurisprudence—What Is.**—"It was never supposed by us," says the Supreme Court in the leading case of *Swift v. Tyson*,<sup>31</sup> "that the section (R. S. 721) did apply or was intended to apply to questions of a more general nature not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the same functions as ourselves, that is to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. . . . Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our judgments are to be bound and governed."

Under the head of *general law*, thus indicated, are included among other things, the right and liabilities of parties to commercial papers of all descriptions;<sup>32</sup> the rights and duties of the parties to contracts of insurance of all kinds;<sup>33</sup> the responsibilities of carriers at common law and under contract;<sup>34</sup> the validity and effect of stipulations limiting liability for negligence;<sup>35</sup> the rules relating to the measure of damages, where

<sup>31</sup> 16 Pet. 1. c. 18.

<sup>32</sup> *Oates v. Nat. Bank*, 100 U. S. 239; *Brooklyn, Etc., R. R. Co. v. Bank*, 102 U. S. 14; *Guernsey v. Imperial Bank*, 188 Fed. 300.

<sup>33</sup> *Carpenter v. Insurance Co.*, 16 Pet. 495; *Washburn v. Reliance, Etc., Co.*, 179 U. S. 1; *Aetna Ins. Co. v. Moore*, 231 U. S. 543; *The Barnstable*, 181 U. S. 464.

<sup>34</sup> *Liverpool, Etc., Co. v. Phoenix, Etc., Co.*, 129 U. S. 397; *Myrick v. R. R. Co.*, 107 U. S. 102; *Baltimore, Etc., R. R. Co. v. Thornton*, 188 Fed. 868.

<sup>35</sup> *Railroad Co. v. Solan*, 169 U. S. 133; *Railroad Co. v. Lockwood*, 17 Wall. 357.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

the subject-matter is not local;<sup>36</sup> the validity, construction and operation of contracts,<sup>37</sup> and the construction of deeds and wills, except where particular language or a particular deed or will has been so construed as to become an established rule of property;<sup>38</sup> the relationship of master and servant, including assumption of risk, contributory negligence and fellow-servants;<sup>39</sup> as well as many other matters of similar *general* character, not provided for by state statutes entering into and qualifying the substance of the legal relation.

In all such matters, the federal courts have established lines of decision which they pursue regardless of whether the state courts have a contrary holding; the inferior federal courts respecting and observing the decisions of their superior tribunals.

§ 10. **Local Rules of Property—Examples.**—Under the head of *local* customary laws, elevated into rules of property by a course of state decisions, come such matters as the following: the nature and extent of riparian rights;<sup>40</sup> the liability of municipal corporations of a state to those injured by the failure to keep sidewalks in repair;<sup>41</sup> whether a lease, drawn under particular options for surrender, is void for want of

<sup>36</sup> *Lake Shore, Etc., R. R. Co. v. Prentice*, 147 U. S. 101; *Western Union, Etc., Co. v. Burris*, 179 Fed. 92; *Woldson v. Larson*, 164 Fed. 548.

<sup>37</sup> *Boyce v. Tabb*, 18 Wall. 546; *Swift v. Tyson*, 16 Pet. 1; *Delmas v. Ins. Co.*, 14 Wall. 661; *Keen v. Read*, 123 Fed. 221.

<sup>38</sup> *Lane v. Vick*, 3 How. 464; *Barber v. Pittsburgh, Etc., Co.*, 166 U. S. 99; *Jackson v. Chew*, 12 Wheat. 153.

<sup>39</sup> *Baltimore, Etc., R. R. Co. v. Baugh*, 149 U. S. 368; *Hough v. R. R. Co.*, 100 U. S. 213; *Wabash R. R. Co. v. Daniels*, 107 U. S. 454; *Randall v. Baltimore, Etc., R. R. Co.*, 109 U. S. 478; *Northern Pac. Co. v. Hambly*, 154 U. S. 349; *Gardner v. R. R. Co.*, 150 U. S. 349; *Beutler v. Grand Trunk R. R. Co.*, 224 U. S. 85.

<sup>40</sup> *Rundle v. Delaware, Etc., Co.*, 14 How. 80; *Conway v. Taylor*, 1 Black. 603; *Barney v. Keokuk*, 94 U. S. 324; *Kaukauna Power Co. v. Green Bay Co.*, 142 U. S. 254; *Archer v. Greenville Sand Co.*, 233 U. S. 60.

<sup>41</sup> *Detroit v. Osborne*, 135 U. S. 492.

mutuality;<sup>42</sup> the validity of special laws of a state legislature authorizing the sale of lands held in trust within the state;<sup>43</sup> the jurisdiction of courts to sell and dispose of a decedent's lands and pass title thereto to a bona fide purchaser;<sup>44</sup> the proper construction of a devise of lands where there was a settled course of state interpretation;<sup>45</sup> whether a lien to secure the payment of the purchase money of lands expressly reserved by the deeds of conveyance, passes to the assignee of the debt;<sup>46</sup> the right of aliens to inherit lands in a state;<sup>47</sup> the extent and purposes for which the right to submerged lands may be passed by the state;<sup>48</sup> the order and manner in which parcels of land affected by a lien are to be sold;<sup>49</sup> the rights of married women to rescind contracts relating to real property and the duty to restore consideration,<sup>50</sup> and the application and effect of the rule in Shelley's case.<sup>51</sup> One or two of these instances are equitable, but they are illustrative of the legal rule.

It is said by the Supreme Court in a case where the Court of Appeals had not agreed upon the proposition, that questions of public policy as affecting the liability for acts done or contracts made or to be performed, within one of the states—when not controlled by the laws of the United States, or by the principles of the commercial law or of general jurisprudence of national or universal application—are governed by the law of the state as expressed in its constitution or statutes, *or declared by its highest court.*<sup>52</sup>

If by this is meant that the settled course of decision of a state is binding upon a federal court as to matters of internal

<sup>42</sup> *Guffey v. Smith*, 237 U. S. 120.

<sup>43</sup> *Suydam v. Williamson*, 24 How. 427.

<sup>44</sup> *Beauregard v. New Orleans*, 18 How. 497.

<sup>45</sup> *Jackson v. Chew*, 12 Wheat. 153.

<sup>46</sup> *Ober v. Gallagher*, 93 U. S. 199.

<sup>47</sup> *Middleton v. McGrew*, 23 How. 45.

<sup>48</sup> *Lowndes v. Huntington*, 153 U. S. 1.

<sup>49</sup> *Orvis v. Powell*, 98 U. S. 176.

<sup>50</sup> *Slaughter v. Glenn*, 98 U. S. 242.

<sup>51</sup> *DeVaughn v. Hutchinson*, 165 U. S. 566.

<sup>52</sup> *Hartford Fire, Etc., Co. v. R. R. Co.*, 175 U. S. 91.

**§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.**

policy, or that the federal courts will lean strongly toward agreement in such matters, there can be no objection to the statement. If it means any more than this, the statement is not only very vague, but is at variance with the principles deducible from some of the other rules to which we have directed our attention.

The great bulk of the cases usually cited as illustrative of local rules of property depend upon the settled construction of state statutory provisions.

The whole situation with respect to the rule of decision, as between state and federal courts, is eloquent of the unscientific character of our law.

## CHAPTER IX.

### THE EQUITY JURISDICTION.

- § 1. Statutory Distinctions.
- 2. Is Equity a Uniform Law?
- 3. Distinction Between Law and Equity.
- 4. Effect of the Distinction—No Federal Substantive Equity.
- 5. Substantive Law and Procedure Distinguished.
- 6. The Same.
- 7. Statutory Extensions of Equity Jurisdiction.
- 8. Equity in Federal Courts Must Follow Analogy of Law.
- 9. Federal Court Must Respect the Right—Cases Analyzed.
- 10. Adequate Remedy at Law.
- 11. Injunctions to Stay State Courts—Problem Stated.
- 12. The Rule of Priority—Its Limitations.
- 13. Injunctions to Enforce Rightful Priority.
- 14. Injunctions By State Courts—Administrative Proceedings.
- 15. Limitations on Issue of Injunctions—State Statutes.
- 16. The Same—Labor Cases.

§ 1. **Statutory Distinctions.** — The distinction between law and equity is thrice recognized in the constitution, viz.: in the second section of Article Three (wherein the judicial power is declared to extend to all cases in law and equity . . . ) and in the Seventh Amendment, which preserves the right of trial by jury “in suits at common law,” where the value in controversy shall exceed Twenty Dollars, and in the Eleventh Amendment exempting the states from certain suits “in law or equity.” While we cannot undertake to look at all the statutes, it may be stated generally that they have conferred from the beginning of the government down to the present time, upon some court of the United States, jurisdiction of suits of a civil nature “at law or in equity.”

It was further provided by the original judiciary act that “the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law;”<sup>1</sup> and this was modified in 1792 so as to provide that “the forms and

<sup>1</sup> 1 Stat. 93.

§ 2 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

modes of proceedings in suits . . . in . . . courts of equity (shall be) . . . according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law; except so far as . . . provided for by the act to establish the judicial courts of the United States; subject, however, to such alteration and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court.”<sup>2</sup>

The same language was substantially employed in 1828, in an act which adopted for law cases the diverse methods of procedure then in use in the respective states, and in effect constitutes Section 913 of the Revised Statutes. I have already called to your attention the provisions of Section 917 of the Revised Statutes of the United States, which, you will remember from the lecture on procedure at law, provides that the Supreme Court shall have power to make rules regulating the practice and modes of proceedings to be used in suits in equity or admiralty by the circuit and district courts.

There are other statutory provisions to which we shall hereafter refer, but none of them change the situation presented by the foregoing.

§ 2. **Is Equity a Uniform Law?**—Many statements have been made to the effect that equity is an absolutely uniform system throughout the United States. Thus it was stated by one of the greatest all-round lawyers who ever practiced in this country that equity “is one uniform system throughout the whole United States—the same in Massachusetts as in Georgia or California; and in general, the sources of that law are to be found, first, in the decisions of the Supreme Court of the United States; second, in the decisions of the Circuit Courts as reported in the Reports of the Circuit Courts; and lastly and perhaps I ought to say mainly, in the equity law of England, to which as you know you have constant reference in

<sup>2</sup> 1 Stat. 276.

studying this subject; and whatever may have been the modification made in the English equity law by statute or by custom, they have no effect in the courts of the United States.’’<sup>3</sup>

There is evidence in the reports that the author of this statement might have qualified certain portions of it, if his attention had been deliberately called to them.

It was said by Mr. Justice Story, who was a veritable encyclopedia of general equity law, although his mind, in my judgment, lacked analytical quality, that “the chancery jurisdiction given by the constitution and laws of United States is the same in all the states, and the rule of decision is the same in all.’’<sup>4</sup>

Similarly it was declared by Chief Justice Marshall that “as the courts of the United States have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in Massachusetts as in other states.’’<sup>5</sup>

Many other cases repeat or approve the same language.<sup>6</sup>

I cannot bring myself to believe that these broad statements are true.

If true, it is certainly of paramount importance, in view of the rules applicable to the decision of cases at law, to clearly determine the boundaries between law and equity.

**§ 3. Distinction Between Law and Equity.**—On grounds heretofore stated, the principles, doctrines and procedure of courts of *equity*, as that term was employed in the Constitution, would necessarily be derived, in the first instance, from that body of precedents erected by the High Court of Chancery in England, and existing at the time of the adoption of

<sup>3</sup> Curtis, Jurisdiction of Federal Courts 2nd Ed., p. 242.

<sup>4</sup> Boyle v. Zacharie, 6 Pet. 1. c. 658.

<sup>5</sup> U. S. v. Howland, 4 Wheat. 1. c. 115.

<sup>6</sup> Livingston v. Story, 9 Pet. 632; Russell v. Southard, 12 How. 139; Neves v. Scott, 13 How. 272; Irvine v. Marshall, 20 How. 558; Barber v. Barber, 21 How. 582; Payne v. Hook, 7 Wall. 425; Watts v. Camors, 115 U. S. 353; Kirby v. Lake Shore, Etc., R. Co., 120 U. S. 130.



the Constitution. As a practical matter, the distinction between law and equity is for the most part purely historical, and exceedingly difficult to clearly delimit save by description. This difficulty is increased by the fact that both systems contain the germ of expansion by making fresh application of old principles and are susceptible alike of legislative extension. In such a matter, history is the test of the past; analogy the guide of the future.

“In every instance,” says the Supreme Court, “in which this court has expounded the phrases “proceedings at common law” and “proceedings in equity,” with reference to the exercise of the judicial powers of the United States, they will be found to have interpreted the former as signifying the application of the definitions, principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration, with reference to equitable, as distinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England.”<sup>7</sup>

So it has been frequently declared, in effect, that the remedies in the courts of the United States are to be according to the principles of common law or equity, as defined and distinguished in that country from which we derive our notion of those principles.<sup>8</sup>

A suit at common law is one in which rights which are legal in their essential nature are to be ascertained and determined, by proceedings in harmony with the practices of a court of law, as contradistinguished from suits in which rights equitable in their nature are recognized or equitable remedies administered.<sup>9</sup>

In an endeavor to lay down a logical rule, the Supreme Court while deprecating the extreme difficulty of laying down a comprehensive test, suggested that wherever an action is simply for the recovery or possession of specific real or personal

<sup>7</sup> Root v. Lake Shore, Etc., R. R. Co., 105 U. S. 189.

<sup>8</sup> Robinson v. Campbell, 3 Wheat. l. c. 222; Thompson v. R. R. Co., 6 Wall. 134.

<sup>9</sup> Parsons v. Bedford, 3 Pet. 433.

property, to which the plaintiff is entitled, or for the recovery of a general money judgment, the action is legal in its nature; but this statement by no means covers the whole ground.<sup>10</sup>

With respect to the creation by statute of new rights, or new remedies for the violation of old rights, the jurisdiction of such cases, as between the law and equity sides of the federal courts, is to be determined by the essential nature of the case, in the light of the historical sources to which reference has been made.<sup>11</sup>

Your acquaintanceship with the history and general scope of equity, I am bound, from your previous course of study under a most accomplished and capable lawyer\* to assume.

**§ 4. Effect of the Distinction — No Federal Substantive Equity.**—What is the real effect of this distinction? So far as the Constitution itself is concerned, the sole importance of the distinction is with respect to the preservation of the right to trial by jury contained in the Seventh Amendment.

The reference to law *and* equity in the third article of the Constitution is merely a declaration that the jurisdiction of the federal courts shall embrace and include both categories. In my judgment no constitutional obstacle stands in the way of adopting a federal code, providing for the fusion and co-administration of law and equity, except the provision for jury trial. The grant of jurisdiction over all cases in law and equity was contained in the constitution of many of the states at the time their codes of civil procedure were adopted.<sup>12</sup>

So far as the federal statutes are concerned, it seems to me that the *writs and processes and the forms and modes* of proceedings of federal courts of equity were to be regulated uniformly by the principles and usages of chancery, and that

<sup>10</sup> *Whitehead v. Shattuck*, 138 U. S. 146.

<sup>11</sup> *Van Norden v. Morton*, 99 U. S. 378; *Cummings v. Merchants Bank*, 101 U. S. 153.

\* Mr. A. B. Shepley, whose resignation from the Chair of Equity has since taken effect.

<sup>12</sup> Cf. *Hornbuckle v. Toombs*, 18 Wall. 648; cf. also, the act of March 3, 1915; J. C., Sec. 274b.

*they* were to be subjected alike to the general rules prescribed by the Supreme Court as to matters of practice; leaving to the subordinate courts, as the sole opportunity for variation in such matters, the power to make rules not inconsistent with the superior regulations. By these statutes the practice, i. e., the *forms and modes* of proceedings were alone intended to be regulated. I do not understand that the United States as a nation has any more right to assert a general control over matters of equity than they have over matters of law. It may vest its courts with such or as little jurisdiction as it pleases, and may regulate and control the manner in which its creatures shall perform their allotted functions, but it remains a nation of limited powers, and the residuary sovereignty is reserved to the states. The mention of law and equity in the constitution is concurrent; and the state legislatures may always, within the limits of their reserved powers, modify or abolish the rights recognized by the ancient common law, in order to keep pace with the new conditions of society.

They must be accorded the same power with respect to equitable rights.

I cannot admit that the federal legislature is empowered to regulate or control the purely substantive equitable law, if such a term may be employed, as distinguished from the forms or modes of proceedings in its courts; nor can I admit that there is embalmed by the language of the constitution any common law of equity, if you will permit me to use this term, which affects the substance of rights not under the dominion of the national government and at the same time is beyond the power of state control or regulation.

**§ 5. Substantive Law and Procedure Distinguished.—**  
The line between substantive law and practice and procedure is undoubtedly difficult to draw, but it nevertheless exists

Let us suppose a case where a state statute provided that upon the breach of condition of a mortgage drawn in a certain form, the property mortgaged should instantly and irrevocably vest in the mortgagee.

The contract is made within the state, and the land and parties affected are within the state. If such condition were broken, the equity of redemption, which has always been recognized as an equitable estate, would be gone by the express policy of the statute. That statute would be absolutely binding upon a federal court of equity sitting in that state, and administering the laws thereof. A mortgage drawn in that same form in a state which had established no rule destructive of the equity of redemption might well be held by a federal court to be subject to the general principle of equity law which affords a right of redemption to a suitor whose security for a debt had been forfeited. The rule of decision in such a case could not be the same throughout the United States.

As stated by Justice Miller, in a leading case upon this subject: "We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court where the proposition that the *rule of practice* of the federal courts in suits in equity cannot be controlled by the laws of the states, is expressed in terms so emphatic and general as to justify the inference here forced upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts *substantial rights conferred by the statutes of a state*, or to add to or take from a contract that which is made a part of it by the law of a state except where the law impairs the obligation of a contract previously made."<sup>13</sup>

The truth of the matter is, as I understand it, that with respect to substantive rights, the federal courts of equity will follow the valid statutes of the state applicable thereto; and this whether such statutes create a new right or enlarge or reduce the right originally recognized by a court of chancery. The only exception to this rule is that the nature of the right, whether newly created or a mere modification of an historical equitable right, must not be such as to require for its enforcement or recognition a procedure which is contrary to the federal requirements enacted by competent authority and controlling the jurisdiction and practice of the federal courts.

<sup>13</sup> *Brine v. Hartford, Etc., Ins. Co.*, 96 U. S. 627.

I understand further that the federal courts of equity will follow and observe a settled course of decision on the part of the state courts, which constitutes a rule of property within that state, no matter whether the decisions establish a legal or an equitable right.

With respect to the general principles of equity, the same rules apply as are followed by the law courts in dealing with questions of general jurisprudence; and in such matters where a state statute or rule of local property is not involved the federal court is entitled and bound to decide for itself, manifesting, I think, practically an entire independence of the decisions of the state courts, and guided by the decisions of its superior tribunals, as well as by the settled rules of the English Chancery.

In matters of practice and procedure, the state laws have never been adopted, save in unimportant particulars, and are powerless of their own force to control the conduct of the federal courts.

§ 6. **The Same.**—It was decided in the case of *Brine v. Hartford*,<sup>14</sup> to which our attention was directed in the preceding section, that the statute of the State of Illinois, which conferred upon a mortgagor an absolute right of redemption within fifteen months after foreclosure by decree, granted a substantive right, which inhered in the contract between the parties and must be respected and observed, even upon foreclosure proceedings in the federal court. In *Clark v. Smith*<sup>15</sup> it was held that a claimant of lands who is out of possession might be compelled under a state statute to execute a deed of release to the rightful owner, who was in possession and had the legal and equitable title; that the effect of the statute was to convert the adverse claimant into a trustee, and the right was substantive and should be enforced by a federal court of equity.

In that case Justice Catron used the following language: “The undoubted truth is that when investigating and decree-

<sup>14</sup> 96 U. S. 627.

<sup>15</sup> 13 Pet. 195.

ing on titles in this country, we must deal with them in practice as we find them, and accommodate our modes of proceeding in a considerable degree to the nature of the case and the character of the equities involved in the controversy, *so as to give effect to state legislation and state policy*; not departing however, from what legitimately belong to the *practice* of a court of chancery.”

Similarly, where a state statute confers the right to have a mortgage cancelled for usury without repaying or offering to repay the loan, this right must be enforced and respected by the federal courts of equity, where the land was situated and the contract executed in that state; and it makes no difference that the general principles of equity require the complainant to do equity, by repaying or offering to repay what was actually due.<sup>16</sup>

A statute giving the right to maintain a suit to cancel as a cloud upon title a deed which was void upon its face will be administered by the federal courts of equity sitting in that state, although courts of equity have laid down the general principle that a deed void on its face does not cast such a cloud upon title as courts of equity will undertake to remove.<sup>17</sup>

So a statute conferring the substantive right to set aside by action in the courts, a will that is forged or fraudulently procured may be administered by a federal court of equity, although no such jurisdiction exists in the absence of such a statute.<sup>18</sup> In the last mentioned case the Court said: “Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Court of the United States, *so long as the equitable rights themselves remain*, yet an enlargement of equitable rights may be administered by the Circuit Court, as well as by the courts of the state.” Where the local statute required a deed to be registered, and there was no provision for registering a copy thereof, and the statute provided that such registration was essen-

<sup>16</sup> *Missouri, Etc., Co. v. Krumseig*, 172 U. S. 351.

<sup>17</sup> *Reynolds v. First Nat. Bank*, 112 U. S. 405; *Cowley v. Northern Pac. Co.*, 159 U. S. 569.

<sup>18</sup> *In re Broderick's Will*, 21 Wall. 503.

tial to the validity of the deed, a court of equity of the United States is necessarily bound thereby.<sup>19</sup>

Where the nature of the right is such as to violate the provisions for trial by jury, in order that it may be enforced, there can of course be no administration of the right in the federal courts of equity.<sup>20</sup>

§ 7. **Statutory Extensions of Equity Jurisdiction.**—Many cases have arisen under state statutes which have undertaken to extend the scope of the action to quiet title.

These cases illustrate the lengths to which the federal courts have gone in order to administer state law, and respect the extension of equitable rights thereby created. In *Holland v. Challen*,<sup>21</sup> a bill was filed to quiet title under a Nebraska statute which provided that an action might be brought by any person, whether in possession or not, claiming title to real estate, against any person who claimed an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title. The bill alleged that the complainant was the owner in fee-simple and entitled to the possession, but made plain that neither party was in possession of the land affected. The lower federal court sustained a demurrer upon the ground that the equity jurisdiction, under its established principles could not be invoked where there had never been any adjudication at law of the title and the complainant was not in possession of the property. The Supreme Court held that it was true that the action was not a bill of peace, nor a bill quia timet, or to remove cloud from title; and that it was generally necessary that the party invoking any of these remedies should be in possession; but an action of ejectment or other similar action for the determination of the right to possession would manifestly not lie, because no one was in possession. As applied to such a case therefore, the statute amounted to an extension of an equitable right, by dispensing with the necessity for plaintiff's possession to maintain an ac-

<sup>19</sup> *Olcott v. Bynum*, 17 Wall. 44.

<sup>20</sup> *Cates v. Allen*, 149 U. S. 451.

<sup>21</sup> 110 U. S. 15.

tion to quiet title, and should be administered and enforced by the federal courts of equity sitting in the State of Nebraska.

On the other hand the case of *Whitehead v. Shattuck*,<sup>22</sup> dealt with a somewhat different situation. There it was provided by the statute of Iowa that an action might be brought to determine and quiet the title to real property by any person claiming title thereto, though not in possession, and against any adverse claimant in or out of possession.

The bill alleged that the complainant was the owner in fee of the property, and that the defendant was in possession and claiming title thereto. The lower federal court sustained a demurrer to the bill of complaint, and this action was sustained by the Supreme Court on appeal. The superior tribunal pointed out that the Seventh Amendment required a trial by jury in cases at common law, and that no federal court of equity could exercise jurisdiction in any case where there was a plain, adequate and complete remedy at law. The instant action was declared to constitute an assertion of plaintiff's title to specific real property; the remedy sought was its possession and enjoyment from a person who was in the actual possession thereof; and in such a contest both the parties had a right to trial by jury under the provisions of the Constitution. In other words the case fell within the class of cases where there was an adequate remedy at law, and was also within the description of cases intended by the constitutional saving of jury trial. In *Greeley v. Lowe*,<sup>23</sup> the Supreme Court said that "this court in a multitude of cases has held that where the laws of a particular state gave a remedy in equity, as for instance a bill by a party in or out of possession to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a jury trial."

**§ 8. Equity in Federal Courts Must Follow Analogy of Law.** — With respect to the interpretation of statutes, it seems folly to suppose that a statute of a state, concededly ap-

<sup>22</sup> 138 U. S. 146.

<sup>23</sup> 155 U. S. 58.



plicable to a given situation, should, in a federal court of law, be given the settled state interpretation; whereas, in the same federal court, sitting as a court of equity, the statute means, or may mean, something entirely different. In this regard, equity must follow the law.

There are many cases where the Supreme Court, sitting in equity, has held that it was bound to follow the settled construction of state statutes, where such construction constitutes a rule of local property.

Their number is legion; but a few will be cited: thus a federal court of equity must follow, with respect to land situated in Texas, the settled construction of the statutes of limitation of that state, which holds that when the note or obligation itself is barred, the mortgage securing it is also barred;<sup>24</sup> where state decisions have established, by construction of the state constitution and statutes, the powers of local municipal corporations, that construction is binding;<sup>25</sup> the right of a married woman to dispose of her separate estate, where it depends upon state statute, will be determined in accordance with settled state interpretation;<sup>26</sup> so, with respect to the right of a married woman to purchase land and create a lien thereon;<sup>27</sup> similarly, with respect to the validity of a deed of trust, which was dependent upon the fixed construction given by the courts of the state to the English statute of frauds;<sup>28</sup> and as to the validity and effect of an assignment for the benefit of creditors.<sup>29</sup> Where it has become a rule of local property, the federal courts of equity will follow the established construction of state statutes of limitations, respecting the title to lands.<sup>30</sup>

While the doctrine is not so thoroughly and explicitly established, yet I conceive it to be the correct rule that federal

<sup>24</sup> Dupree v. Mansur, 214 U. S. 1. c. 166.

<sup>25</sup> Old Colony Trust Co. v. Omaha, 230 U. S. 1. c. 116.

<sup>26</sup> Glenn v. Slaughter, 98 U. S. 242; Lippincott v. Mitchell, 94 U. S. 767.

<sup>27</sup> Bedford v. Burton, 106 U. S. 338.

<sup>28</sup> Lloyd v. Fulton, 91 U. S. 479.

<sup>29</sup> Union Bank v. Kansas, Etc., Bank, 136 U. S. 223.

<sup>30</sup> Elder v. McClaskey, 70 Fed. 529.

courts of equity will and should follow the rules of local property established by a course of state decision, in the absence of any statute.

Here, again, just at law, there is bound to be some difficulty in distinguishing between matters of general equity jurisprudence, and strictly local law; and we have here the further difficulty of distinguishing between substantive equitable right and matters of procedure.

There are nevertheless a number of cases which seem to me to clearly assert the rule suggested. Thus it is held that the order in which various parcels of mortgaged property are to be sold to satisfy the debt, where no state statute appears to have existed, was to be determined by a federal court of equity in accordance with the decisions of the state courts which had become rules of property within the state.<sup>31</sup>

So the federal courts will follow the settled course of state decision recognizing the existence of a right in equity to enforce liens, for the enforcement of which no statutory remedy exists, although the lien is of a common law character.<sup>32</sup> Similarly the question whether the equitable lien for purchase money passes by an assignment of the debt, will be determined by federal courts of equity in accordance with the rule of property established by a course of state decisions.<sup>33</sup>

The order of priority of notes, secured by mortgage, when they have passed into the hands of different holders will be determined by the rule established by state decisions;<sup>34</sup> and the same is held, where the question is as to the equitable right of an abutting owner to enjoin the construction of a railroad in the highways.<sup>35</sup>

In a case that seems to go too far, the law of Michigan, as settled by repeated and uniform decisions of the Supreme Court of Michigan was that a stipulation in a mortgage for the payment of an attorney's fee on foreclosure was contrary to

<sup>31</sup> *Orvis v. Powell*, 98 U. S. 176.

<sup>32</sup> *Knapp v. McCaffrey*, 177 U. S. 645.

<sup>33</sup> *Ober v. Gallagher*, 93 U. S. 199.

<sup>34</sup> *New York, Etc., Co. v. Lombard*, 65 Fed. 271.

<sup>35</sup> *Lobenstine v. Union, Etc., R. R. Co.*, 80 Fed. 9.

public policy and void; and the United States Supreme Court held, reversing the lower court, that the federal court sitting in equity in that state, and dealing with land situated and a contract made in that state must follow in this respect the settled course of state decision.<sup>36</sup>

On the other hand, in a later case, it was held, without overruling the case cited, that while contract rights are settled by the law of the state, that law does not and cannot determine the *procedure* of the courts of the United States, sitting in equity, or the costs which are properly taxable therein, or control their discretion as to the allowance of fees.<sup>37</sup> Their general powers as courts of equity are not determined and cut off by state legislation; and they have the power to make reasonable allowances to trustees for expenses and counsel fees.

Other cases dealing more or less with the conformity to state decisions are referred to below.<sup>38</sup>

A very recent case illustrates beautifully the difference between *substantive* and *procedural* rights in equity.<sup>39</sup>

**§ 9. Federal Court Must Respect the Right—Cases Analyzed.**—Granted the existence of a substantive right, the federal courts are at liberty to determine for themselves whether it is of a nature to fall upon the law or equity sides of the federal jurisdiction, as heretofore suggested. If it lie within the equity jurisdiction, the procedure to be adopted for its enforcement and protection cannot be controlled in any way by state statutes or decisions, provided the substance of the right is in effect preserved. In the course of that enforcement, I conceive that the federal court would make use in its discretion of such weapons as might be found in the armory of

<sup>36</sup> Bendey v. Townshend, 109 U. S. 665.

<sup>37</sup> Dodge v. Tulleys, 144 U. S. 451.

<sup>38</sup> DeVaughn v. Hutchinson, 165 U. S. 566; Loewe v. State Federation, 189 Fed. 714; Lumber Co. v. Ott, 142 U. S. 670; Allis v. Ins. Co., 97 U. S. 145; Connecticut Mutual Co. v. Cushman, 108 U. S. 51; Swift v. Smith, 102 U. S. 450.

<sup>39</sup> Guffey v. Smith, 237 U. S. 120.

the general equity system, so long as they were not prohibited by federal statute or other controlling federal regulation.

In this respect the federal jurisdiction and power would be uniform throughout the United States, except so far as local and valid court rule might affect the particular situation. The same would be true of the general, as distinguished from the local, substantive principles and doctrines of equity jurisprudence.

Turning now to some of the cases which have been earlier cited as holding in favor of the absolute uniformity of the rule of decision throughout the United States, when carefully analyzed with reference to what was actually decided, they are not opposed to these statements, although some of the language therein may go too far by way of general expression.

The case of *Robinson v. Campbell*<sup>40</sup> merely decided that an equitable title could not be set up by way of defense to a legal action in the federal courts, regardless of the state decision, and there was no doubt of the correctness of this decision. The case of *United States v. Howland*<sup>41</sup> was one where by the statutes of the United States the government had a preference over general creditors.

Judgments had been recovered by the government, and executions were returned unsatisfied. Thereupon a bill in equity was brought in the United States Circuit Court sitting in the State of Massachusetts, against certain trustees under a deed of trust, who were claimed to be indebted to the original defendants in the execution, to have an account taken of the indebtedness, and the funds in their hands applied to the judgment. There were no equity courts in the State of Massachusetts, and its statutes provided for the bringing of an action at law under such circumstances directly against the indebted trustees. The court in effect held that such a situation could not affect the right, under such circumstances, to an equitable remedy in the federal courts.

The case of *Boyle v. Zacharie*<sup>42</sup> held that state statutes which

<sup>40</sup> 3 Wheat. 1. c. 222.

<sup>41</sup> 4 Wheat. 1. c. 115.

<sup>42</sup> 6 Pet. 1. c. 658.

provided that an injunction should have the effect of a supersedeas even after levy made and order of sale, could not control the chancery proceedings of the federal court; and that conditions and restrictions imposed by the state upon the effect of state executions could not bind or control executions issuing out of the courts of the United States.

In *Livingston v. Story*<sup>43</sup> a bill was filed in the federal court sitting in the State of Louisiana, seeking to set aside an apparently absolute conveyance and have it declared a mortgage, and praying an account and redemption, and discovery in aid thereof. The law of Louisiana was based upon a code that did not recognize equitable rights as such, nor were there any equity courts in that state. The court in effect held that the mere fact there was no court of equity in that state, nor any rights or claims recognized as equitable as contradistinguished from legal rights, could not have any effect in preventing the exercise of the equity jurisdiction of the federal courts. In this case it may be clearly gathered by inference that the laws of the State of Louisiana did not deny to Livingston precisely the same substantive rights that he sought to enforce by bill in equity, but that these substantive rights were not recognized by the state laws as equitable, because the whole system of equity was foreign to the jurisprudence of that state. The case amounts simply to holding, therefore, that where a substantive right in fact existed, the courts of the United States would enforce it upon their equity side, regardless of how it was denominated, if in fact it fell within the principles of the equity system. *Russell v. Southard*<sup>44</sup> was a case where the bill sought to have an apparently absolute conveyance declared a mortgage and a mere security. The court held that to insist that a mortgage was really a deed was in equity a fraud, and that it was entitled to take evidence of an extraneous character to prove that fraud, in spite of the deed and its recitals. In answer to the suggestion that a different rule was maintained by the Supreme Court of Kentucky, in which state

<sup>43</sup> 9 Pet. 632.

<sup>44</sup> 12 How. 139.

the land was situated, the court said that this was a matter of *general* equity jurisprudence, and that the court must be governed by its own views of those principles. But it distinctly appears that there was no statute or rule of property to the contrary in that state.

In *Neves v. Scott*<sup>45</sup> the questions were whether the trusts in controversy were to be construed as executed, and whether particular claimants thereunder were volunteers, or within the consideration of the articles of trust. Justice Curtis declared that these were questions of general equity law, and significantly adds: "No question has arisen concerning any statute law of the state of Georgia; nor was it then nor is it now suggested that any word or phrase or provision of the articles should bear any particular or technical meaning, by reason of any local law or custom."

There are many other cases where misleading general language has been used; but when analyzed, few, if any, of them will be found to militate against what we have laid down.

It *has* been held that a state statute of limitations, affixing a limit of time within which state courts could afford relief for fraud, would be denied binding effect in a federal court of equity.<sup>46</sup> In so far as such a statute of limitations should be regarded as merely affecting the *remedy*, and not the *right*, the decision may be supported; because there is no federal *statute* commanding federal courts of equity to follow state laws at all. If the state statute destroyed the *substantive* right, either by expression or settled state construction, I think the federal courts would have to follow it, whether they fancied the rule or not.

Finally, I may be permitted to register the conviction, that just as there is no common law of the United States, but, so far as it affects matters under the dominion of the state, simply the common law of the state; in precisely similar fashion, there is no equity law of the United States, but it is the equity law of each particular state. I really do not know, in the pres-

<sup>45</sup> 13 How. 272.

<sup>46</sup> *Kirby v. Lake Shore, Etc., R. R. Co.*, 120 U. S. 130.

ent situation, but that further federal usurpation might be desirable; but there has, nevertheless, been a species of usurpation.

§ 10. **Adequate Remedy at Law.**—There are certain statutory provisions affecting the jurisdiction in equity to which our attention must be further directed. It is provided by Section 267 of the Judicial Code, that “suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law.” The section was contained in the first judiciary act, passed in 1789. It was the understanding of its framers that they were not enunciating any new rule, but were giving emphasis, by legislative repetition, to one that had always existed. It has been many times decided that it expresses a limitation which would exist, had no such statute been passed.<sup>47</sup> Its sole effect is to fix the date as of which the adequacy or inadequacy of legal remedy should be calculated. It has been held by the Supreme Court, that in the absence of especial provision by Congress to the contrary, the test of an adequate remedy at law is whether such remedy existed at the time of the passage of the first judiciary act.<sup>48</sup>

The remedy at law referred to is not to be conclusively determined by the statutes of a state,<sup>49</sup> but by the common law.<sup>50</sup> As to when and under what circumstances the remedy at law should be considered adequate or inadequate would take us further into the region of general equity law than time will allow.

Generally speaking, in order to exclude a concurrent remedy in equity, the remedy at law must be as complete, as practical, and as efficient to the ends of justice and its prompt

<sup>47</sup> *Boyce v. Grundy*, 3 Pet. 210; *Oelrichs v. Williams*, 15 Wall. 211; *New York, Etc., Co. v. Memphis, Etc., Co.*, 107 U. S. 205; *Whitehead v. Shattuck*, 138 U. S. 146; *Wehrman v. Conklin*, 155 U. S. 323.

<sup>48</sup> *McConihay v. Wright*, 121 U. S. 201.

<sup>49</sup> *Smyth v. Ames*, 169 U. S. 1. c. 516.

<sup>50</sup> Cf., however, *Union Pac. R. R. Co. v. Board*, 222 Fed. 651.

administration as the remedy in equity.<sup>51</sup> It may be remarked that while the courts may take this objection *sua sponte*, yet it is always advisable for the defendant to raise the objection of adequate remedy at law at the earliest opportunity possible; for if he fails to do so, and proceed with the cause without raising the objection by motion or answer he may be held to have waived it, provided the subject matter belongs to the general class of cases over which a court of equity under any circumstances may exercise jurisdiction.<sup>52</sup>

**§ 11. Injunctions to Stay State Courts—Problem Stated.**  
—It was further provided by Congress in 1793, that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.

This provision was amended upon the compilation of the Revised Statutes in 1873, by adding the words, “except in cases where such injunction may be authorized by any law relating to bankruptcy proceedings.”<sup>53</sup>

The language of the statute is very broad and taken literally, would seem to embody an absolute negation of the right of any federal court to stay any proceedings in any state court by the writ of injunction. To this extent, however, the courts of the United States have never gone in its interpretation. It must be confessed that the relationship in this respect between the courts of the state and of the nation has not been marked out by the course of decision, so as to be reduced to a plain statement of theory.

From the standpoint of sovereignty, the United States and a state thereof are regarded in many respects as if they were distinct and unconnected territorial jurisdictions, although the boundaries between them are physically invisible.<sup>54</sup>

Now it is the settled rule in the courts of law, that the pen-

<sup>51</sup> *Tyler v. Savage*, 143 U. S. 79; *Walla Walla v. Water Co.*, 172 U. S. 1. c. 12.

<sup>52</sup> *Beyer v. Le Fevre*, 186 U. S. 114; *Hollins v. Brierfield Coal Co.*, 150 U. S. 371; *Reynes v. Dumont*, 130 U. S. 354.

<sup>53</sup> J. C., Sec. 165; R. S. 720.

<sup>54</sup> *Ableman v. Booth*, 21 How. 506.



§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

dency of another action, between the same parties and concerning the identical subject-matter, in a foreign state, is no binding or valid plea of abatement in the domestic tribunal; and the same rule, qualified to some extent by discretion, generally prevails in equity.<sup>55</sup> These same rules are usually applied between the courts of a state and those of the nation.<sup>56</sup>

We have already noted, however, that the courts of a country may exercise lawful control over all persons within their territorial jurisdiction; and there is no doubt that in a proper case, the courts of equity of one state can restrain persons within their jurisdiction from the prosecution, contrary to good conscience, of a suit in another state or country.<sup>57</sup>

Such general rule upon principle should equally apply to state and federal courts, as belonging to hypothetically distinct sovereignties in the exercise of their concurrent jurisdiction.

The fact, however, that state and federal courts exercise their powers concurrently in many classes of cases, over the same physical territory, renders expedient establishment of somewhat different rules, because of the practical necessity of avoiding conflict and confusion.

This conflict or confusion may arise in several ways. It may arise where one court has taken actual or constructive possession of or assumed potential dominion over specific property and the jurisdiction of another court belonging to the other sovereignty, is invoked by third persons, or by some of the parties or their privies.

It may arise where rights of a tangible or intangible character, are sought to be enforced, protected or preserved by the injunctive order of the court, and some of the parties, plaintiff or defendant, or their privies, appeal to the courts of the concurrent sovereignty for a determination of those same rights between substantially the same parties.

<sup>55</sup> *Mutual Ins. Co. v. Brune*, 96 U. S. 588.

<sup>56</sup> *Gordon v. Gilfoil*, 99 U. S. 168; *Stanton v. Embry*, 93 U. S. 548; *Hunt v. Cotton Exchange*, 205 U. S. 322.

<sup>57</sup> *Cole v. Cunningham*, 133 U. S. 107.

It may also arise, usually at a later stage of the action, where an action of a purely personal character having no relation to any specific thing is being brought in the courts of the one, and jurisdiction of the parties obtained, but before the final conclusion, some of the parties or their privies bring another suit involving the same parties and the same subject-matter in the courts of another sovereignty.

I do not understand that under any of these circumstances the pendency of the other action is pleadable, as of right, in bar or abatement in either court. Unless therefore, something is done by way of comity the results would be, in the first class of cases, that both courts will be attempting to assert dominion at the same time over the same property; in the second class of cases, there may well be the command of performance by the first, that is forbidden by the other; and in the third class of cases, a judgment in one court might be (conceivably) negatived by the concurrent fiat of the other—or at least there may be a scramble, of undignified sort, to see which court can beat the other to judgment.

All of these different results, where the jurisdiction is concurrent, may arise under the circumstances supposed within the territorial jurisdiction and where the parties concerned are immediately subject to the binding and intrinsic force of the orders and judgments rendered by both courts sitting within the jurisdiction.

**§ 12. The Rule of Priority—Its Limitations.**—The rule has often been laid down in general terms, and especially in latter times, that no matter whether the jurisdiction of state or federal court of concurrent jurisdiction first attaches over the subject-matter by the institution of proceedings, that court whose jurisdiction first attaches is entitled to retain the cause to the end, until its purposes are accomplished, and its jurisdiction exhausted.<sup>58</sup>

<sup>58</sup> *Rickey v. Miller*, 218 U. S. 258; *Ex parte Young*, 209 U. S. 123; *Prout v. Starr*, 188 U. S. 537; *Peck v. Jenness*, 7 How. 612; *Riggs v. Johnson County*, 6 Wall. 166; *Harkrader v. Wadley*, 172 U. S. 148; *Taylor v. Taintor*, 16 Wall. 370; *Sharon v. Terry*, 36 Fed. 337;

Notwithstanding the generality of the foregoing statement, it is held by a long line of decisions in the lower federal courts, that it is to be interpreted as having no application to cases where a mere personal judgment is demanded. The clearest statement of this doctrine that I have been able to find is by Judge Jenkins of the Seventh Circuit: "It is settled that when a state court and a court of the United States may each take jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted.

"The rule is limited to actions which deal either actually or potentially with specific property or objects. Where a suit is strictly *in personam*, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit is brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law."<sup>59</sup>

In another case Judge Adams holds that the general rule applies only to cases involving "title to real estate or to some specific personal property which actually was in *custodia legis* or practically so by operation of an injunctive order restraining interference with them."<sup>60</sup> Other cases are referred to below.<sup>61</sup>

As I understand this limitation, it modifies the foreign and

Thorpe v. Sampson, 84 Fed. 63; Gamble v. San Diego, 79 Fed. 487; Starr v. Chicago, Etc., R. Co., 110 Fed. 6; Central Vermont Co. v. Redmond, 189 Fed. 683; Peoples, Etc., Co. v. Chicago, 192 Fed. 398.

<sup>59</sup> Baltimore, Etc., R. R. Co. v. Wabash Co., 119 Fed. 678.

<sup>60</sup> Mankato v. Barber Asphalt Co., 142 Fed. l. c. 341.

<sup>61</sup> Merritt v. Barge Co., 79 Fed. 228; Zimmerman v. Sorelle, 80 Fed. 417; Green v. Underwood, 86 Fed. 427; Boatmen's Bank v. Fritzlen, 135 Fed. l. c. 667; Guardian Trust Co. v. K. C. R. Co., 171 Fed. 43; Barber Asphalt Co. v. Morris, 132 Fed. 945.

distinct sovereignty notion by including under a rule of necessary and obligatory comity: (1) Real or personal property within the actual possession of the court; (2) specific property, real or personal, against which the decree, order or judgment is to operate, and for the purposes of the execution of which decree or judgment an inchoate dominion, as against other co-ordinate courts, must be asserted *ab initio*; and (3) a right or rights sought to be protected or enforced by injunctive order or decree, regarded as thereby placed within the guardianship and custody of the court of co-ordinate jurisdiction first appealed to.

§ 13. **Injunctions to Enforce Rightful Priority.**—While I am bound to believe that the law upon these propositions is still in a formative stage, it seems to me that this rightful priority must somehow be enforced by the federal court entitled to it, whenever that priority is substantially threatened; and that the federal court of equity may, in spite of the prohibition of Section 720, enjoin under proper circumstances all interference by action with the property mentioned in subdivision (1) *supra*; and may likewise enjoin the prosecution of conflicting proceedings subsequently begun in a state court, to determine rights in the subject-matter embraced in subdivisions (2) and (3) whether such subsequent and conflicting proceedings be civil or criminal.<sup>62</sup>

In its last statement upon the subject the Supreme Court uses the following language: "The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined to instances where both suits

<sup>62</sup> *Rodgers v. Pltt*, 96 Fed. 671; 104 Fed. 387; *Ex parte Chamberlain*, 55 Fed. 70; *Standley v. Roberts*, 59 Fed. 836; *Rickey v. Miller*, 218 U. S. 258; *Ex parte Young*, 209 U. S. 123; *Prout v. Starr*, 188 U. S. 537; *Harkrader v. Wadley*, 172 U. S. 148; *Sharon v. Terry*, 36 Fed. 337; *Harding v. Corn Products Co.*, 168 Fed. 658; see also authorities cited in preceding notes.

are substantially the same; that is to say, where there is substantial identity in the interests represented, in the rights asserted, and in the purposes sought.<sup>63</sup>

As applied to subdivision (1) *supra*, this statement is not true; and I do not think it is universally true with respect to the second subdivision.<sup>64</sup>

More largely, perhaps more accurately, expressed, the federal court may enjoin an action in a state court whenever necessary to sustain and effectuate its own jurisdiction, rightfully attached, in spite of the provisions of that section. From this standpoint, the three subdivisions stated above are but instances, where most usually the necessity of enforcing that jurisdiction becomes apparent.

Even in those instances the collision and conflict must always be imminent. It is not necessary, even there, that the subsequent court immediately throw the parties out of court. The action in the second court may be so conducted as to stop short of collision. The prior jurisdiction may be abandoned or the relief denied for some reason not fundamental; and in such an event the second court might well assert a priority over still subsequent tribunals, or afford the relief sought without putting the parties to a fresh action.<sup>65</sup>

As illustrating the larger statement of the rule, in a number of instances the federal court, where necessary to assert and maintain its rightfully exclusive jurisdiction upon removal has enjoined the parties from proceeding in the state court.<sup>66</sup>

<sup>63</sup> *Pacific Live Stock Co. v. Lewis*, 241 U. S. 1. c. 447.

<sup>64</sup> Cf. generally, *Gaylord v. Fort Wayne, Etc., R. R. Co.*, 6 Biss. 286; *Oliver v. Parlin*, 105 Fed. 272; *Rickey v. Miller*, 152 Fed. 1; S. C., 218 U. S. 1. c. 262; *Hunt v. Cotton Exchange*, 205 U. S. 1. c. 339.

<sup>65</sup> *McClellan v. Carland*, 187 Fed. 915; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650; *Williams v. Neely*, 134 Fed. 1; *Zimmerman v. Sorelle*, 80 Fed. 417.

<sup>66</sup> *Abeel v. Culberson*, 56 Fed. 329; *Frishman v. Culberson*, 41 Fed. 449; *Madisonville, Etc., Co. v. St. Bernard Co.*, 196 U. S. 239.

So the federal court may, in the exercise of its ancillary jurisdiction, resort to injunction as against proceedings in state courts, to effectuate its own judgments and to protect the rights thereunder acquired.<sup>67</sup>

It has been held by a very able judge, that where a suit in equity against a corporation is pending in the federal court, and the corporation under state laws brings a proceeding in a state court for its own dissolution, the latter action may be enjoined, lest thereby the jurisdiction of the federal court be nullified.<sup>68</sup>

The general rule is frequently laid down, by way of exclusion, that the prohibitory statute has no application, unless a suit be *pending* in a state court, at the time the jurisdiction of the federal court is invoked.<sup>69</sup>

**§ 14. Injunctions by State Courts—Administrative Proceedings.**—While there is considerable loose language in the reports as to the inability under any circumstances of a state court to enjoin the prosecution of an action in the federal courts, yet upon the principle of co-ordinate and concurrent jurisdiction of the two sovereignties, I cannot see why a state court should not enjoin where a federal court, in the same situation, might do so.

It is, of course, understood, that even at common law, no court ever undertook to directly prohibit the exercise of its jurisdiction by another; and under our separation of powers the federal courts themselves, and their writs and processes

<sup>67</sup> *Riverdale Mills v. Mfg. Co.*, 198 U. S. 1. c. 196; *Julian v. Central Trust Co.*, 193 U. S. 93; *Dietsch v. Huidekopper*, 103 U. S. 494; *Garner v. Bank*, 67 Fed. 833; *Wadley v. Blount*, 65 Fed. 667; *Central Trust Co. v. Western, Etc., R. Co.*, 89 Fed. 24; *French v. Hay*, 22 Wall. 250.

<sup>68</sup> *Fisk v. R. R. Co.*, 10 Blatchf. 520.

<sup>69</sup> *Ibid.* *Lindley v. National, Etc., Co.*, 162 Fed. 954; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 532; *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500; *Evans v. Gorman*, 115 Fed. 399; *Iron Mountain Co. v. Memphis*, 96 Fed. 113; *French v. Hay*, 22 Wall. 250; *Taylor v. Taintor*, 16 Wall. 370; *Sharon v. Terry*, 36 Fed. 337; *T. & P. R. Co. v. Kuteman*, 54 Fed. 547.

are beyond state control, just as the state courts and their writs and proceedings, in the exercise of their jurisdiction are beyond direct federal prohibition. In all cases the only injunction possible operates *in personam* upon the conscience of the *litigant* and is addressed to him.

I am disposed strongly to agree with the statement by the New Jersey Court of Appeals, that there is little or no satisfactory authority that a state court is without power, under any circumstances, to restrain a litigant in a federal court, where no federal *question* (meaning, I assume, *prohibition*) is involved.<sup>70</sup>

Broad contrary language is employed, for example, by an inferior New York case,<sup>71</sup> which relies on *Central National Bank v. Stevens*.<sup>72</sup> Certain language in the latter case is difficult to reconcile with some statements heretofore made, but the actual decision is not. The jurisdiction of the federal court in that case was prior, its decree had been rendered, and in that decree itself there was no fraud claimed; although the original state judgment, upon which the decree was founded, had, after such decree, been set aside by a state court for fraud in its procurement, which latter court then enjoined the parties claiming under the federal judgment. The case came to the Supreme Court upon writ of error, it being claimed that due effect had not been given to the decree of the federal court.

It is unquestionably true that the state courts, nearly always, refrain from enjoining the parties from prosecuting their actions in the national courts. The latter courts are courts of equity as well as of law, and they are thoroughly competent to protect whatever equities may be justly claimed.

Upon the ground, then, of respect and comity, rather than absolute lack of power, this abstention must be founded.

<sup>70</sup> *Shaw v. Frey*, 69 N. J. Eq. 321; Cf. *Avery v. Vilas*, 15 Wisc. 401; *Insurance Co. v. Howell*, 24 N. J. Eq. 239; *Safford v. People*, 85 Ill. 558.

<sup>71</sup> *Johnston v. Morse*, 90 N. Y. Sup. 107.

<sup>72</sup> 169 U. S. 432.

You will observe, that we have been speaking of cases where the same subject-matters, controversy, or questions were involved. The prohibition, whether founded on the statute or on mere comity, has no application where an independent subject-matter is in issue, distinct from and not included in the one involved in the other litigation.<sup>73</sup>

Thus where a state judgment, as yet unsatisfied, is alleged to have been procured by fraud, that fraud could not possibly have been the subject of investigation by a state court rendering the decree; otherwise it is inconceivable that the judgment complained of should have been rendered. The right to set aside that judgment or decree is a distinct and substantive equitable right that first accrued upon the rendition thereof; and such right may be claimed in a federal court of equity, against a state judgment, although it involve the prohibition of execution.<sup>74</sup> And, on the other hand, authority is not lacking for the right of the state court to set aside for fraud a federal judgment.<sup>75</sup> It is plain, also that the prohibition of Section 720 has reference to proceedings in a *court* of the state, and does not apply where the proceedings are not *judicial* in the proper sense of that word.<sup>76</sup>

**§ 15. Limitations on Issue of Injunctions — State Statutes.**—Owing to the very grave complaints excited against the federal courts by the habit of seeking to check or supersede the enforcement of state statutes by invoking, as a ground for injunction, their conflict with the impairment of contract or due process clauses of the federal constitution, it has been provided by Section 266 of the Judicial Code that “no interlocutory injunction suspending or restraining the enforcement, operation or execution of *any statute of a state*, by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of

<sup>73</sup> Hunt v. Cotton Exchange, 205 U. S. 322.

<sup>74</sup> *Ex parte* Simon, 208 U. S. 144; Marshall v. Holmes, 141 U. S. 589; National Surety Co. v. Bank, 120 Fed. 593.

<sup>75</sup> Keith v. Alger, 114 Tenn. 1.

<sup>76</sup> Prentiss v. Coast Line Co., 211 U. S. 1. c. 226.



§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted, by any Justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, *upon the grounds of the unconstitutionality of such statute*, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by *three judges*," one of whom must be a justice of the Supreme Court or a circuit judge, and a majority must concur in awarding such injunction.

At least five days' notice must be given of the hearing of the application, to the governor and attorney-general of the state, as well as to the defendants.

Lest, however, so stringent a prohibition should too greatly cripple the equity jurisdiction, a proviso confers the power upon the particular *judge* to whom the application is made, to grant, in cases where *irreparable loss or damage* would otherwise ensue, a *temporary restraining order*, at any time before the hearing of the application for a preliminary injunction before the three judges above required.

In such a case the hearing upon the application for preliminary injunction must be given precedence, and be in every possible manner expedited, consistently with the five days' notice specified.

An appeal may be taken directly to the Supreme Court, from the order granting or denying, after notice and hearing, the interlocutory injunction.

It is further provided that if before such application is determined in the federal court, a suit shall have been brought in a state court, of competent jurisdiction, to enforce such statute or order, accompanied by a stay in the state court of proceedings thereunder, pending the state court's determination, then all proceedings in the federal court shall be stayed until the final determination of such suit in the state courts. If, however, at any time, upon ten days' notice, it be shown

to the federal court that the state suit is not being prosecuted with diligence and in good faith, the federal court may revoke its stay and proceed.<sup>77</sup>

Restrictions of quite similar sort are imposed upon the granting of injunction to suspend or restrain orders of the Interstate Commerce Commission.<sup>78</sup>

§ 16. **The Same—Labor Cases.**—By the Act of October 15, 1914, no restraining order or injunction can be granted by any court or judge of the United States in any case between employer or employes, or between employes, or between persons employed and those seeking employment, involving or arising from a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or a property right of the applicant; and no such restraining order or injunction shall prohibit any persons or persons: (a) From, whether singly or in concert, terminating any relation of employment, or ceasing to work, or peacefully persuading others to do so; (b) from attending at any place where such person or persons may lawfully be, to peaceably obtain or communicate information, or persuade any others to work or abstain therefrom; (c) from ceasing to patronize or employ any party to such dispute, or from persuading others, by peaceable and lawful means, so to do; (d) from paying to or withholding from any person engaged in such dispute any strike benefits or other moneys; (e) from peaceably assembling in a lawful manner, and for lawful purposes; or (f) from doing any act or thing which might lawfully be done, in the absence of such dispute, by any party thereto.<sup>79</sup>

<sup>77</sup> J. C., Sec. 266 (as amended).

<sup>78</sup> Act of Oct. 22, 1913; 38 Stat. 220.

<sup>79</sup> 38 Stat. 737.

## **CHAPTER X.**

### **EQUITY PROCEDURE.**

- § 1. The New Equity Rules.
- 2. Proceedings as of Course.
- 3. Parties—Fundamental Rules.
- 4. Plaintiffs—Real Party in Interest.
- 5. Right of Representation—State Laws.
- 6. Representation—Class Suits.
- 7. Joinder of Plaintiffs.
- 8. Joinder of Defendants.
- 9. Indispensable and Necessary Parties.
- 10. Proper Parties.
- 11. Formal or Nominal Parties—Criticism.
- 12. Rules Dispensing With Parties.
- 13. Objection for Want of Parties.
- 14. Incompetent Parties.
- 15. Intervention—Origin.
- 16. Intervention—Two Aspects.
- 17. Who May Intervene as Party.
- 18. Method of Intervention—Meaning of “In Harmony With.”

§ 1. **The New Equity Rules.**—In pursuance of the authority vested (or perhaps confirmed) by the statutes to which reference has been made, the Supreme Court, on the 4th day of November, 1912, adopted and promulgated what are now generally known as the New Equity Rules, which took the place of the older rules adopted in 1842. These new rules form the principal source of federal equity practice. Such interstices in the structure of that practice as remain unfilled by the expression or implication of these rules must, in my judgment, upon general principles as well as under the express terms of Section 913 of the Revised Statutes, be pieced out from the traditional English procedure, as modified by the federal decisions; in so far, at least, as local rules prescribed by the particular court have not covered the omission.

This conclusion is not changed by the fact that old Equity Rule 90 provided that, in all cases where the rules prescribed

by the Supreme or Circuit Courts did not apply, the practice at that time (1842) of the High Court of Chancery (so far as not inconsistent with local convenience) should be regarded as furnishing just analogies to regulate the practice; whereas no such provision is contained in the new rules.

As the purpose of these lectures is a purely practical one, no complete compendium of equity practice, or commentary on the Code of Civil Procedure (from which many of the late modifications have been abstracted) is possible within the limits which have been assigned. Neither shall I undertake to criticise the new rules, because we are dealing here emphatically with the things that are, rather than the things that might or should be; and I suppose that so long as there are laws or lawyers, we shall continue to make and subsequently to improve upon innovations; according to the maxim sometimes quoted by the greatest of our old masters, that *nihil simul est inventum ac perfectum*.

§ 2. **Proceedings as of Course.**—The judicial power of the United States is vested by the letter of the Constitution in *courts*, rather than in the judges. There are, however, many proceedings of a preparatory character, or subsidiary to the hearing and determination of the merits of the cause, such as the filing of pleadings, the issue and return of process, the making and directing of interlocutory motions, orders, rules and commissions, which do not require for their validity the solemn and public session of the court, and for the purpose of which it is declared to be perpetually in session.<sup>1</sup>

Of these preliminary or supplementary proceedings, some are allowable *as of course*—of so ministerial a complexion as to be usually attended to by the clerk, who is the mere scribe of the court; while others are *not of course*, and demand sanction and authority from the court or judge.

Of the former sort are such matters as an application for the issuance of *mesne* or final process, or for taking of a bill

<sup>1</sup> Rule 1.

*pro confesso*; but the action of the clerk is always subject to alteration by the judge.<sup>2</sup>

Application for such proceedings as are *not of course* must be made to the court or judge, who may (on reasonable notice to the party affected) "make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable as of course, according to the rules and practice of the court."<sup>3</sup>

For the facilitation of judicial business, the clerk is required to be in attendance at his office, during business hours, on all days except Sundays and legal holidays.<sup>4</sup> He must also keep three separate record books, designated respectively as the "Equity Docket," the "Order Book" and the "Equity Journal."

In the first are noted briefly all papers filed, the process issued, the returns thereof and all appearances. The second contains at length all orders passed by the clerk, or by the judge in chambers. The third is a record at large of all orders, decrees and proceedings of the court of equity in term time.<sup>5</sup>

No entry in the "Equity Docket" or "Order Book" operates as constructive notice; and in all cases where an order is made, without prior notice to *and* in the absence of a party, it is the duty of the clerk, unless otherwise directed by the court or judge to mail a copy thereof to the absent party or to his solicitor. Such mailing is noted in the "Equity Docket," which is a sufficient evidence of due notice of the order.<sup>6</sup>

Out of every month at least one day is regularly set apart as Motion Day, on which the court or judge will hear the dispose of motions requiring notice and hearing; but the judge may nevertheless on any and all days (that are *dies juridici*) make and direct, upon reasonable notice all interlocutory

<sup>2</sup> Rule 5; Rule 2.

<sup>3</sup> Rule 1; appointment of receiver, see *Horn v. R. R. Co.*, 151 Fed. 626; confirmation of sale, *Central Trust Co. v. Sheffield*, 60 Fed. 9.

<sup>4</sup> Rule 2.

<sup>5</sup> Rule 3.

<sup>6</sup> Rule 4.

orders, rulings and proceedings for the advancement, conduct and hearing of causes.<sup>8</sup>

The senior circuit judge has power to dispense with motion days in any district for not exceeding two months in the year, thus affording opportunity for judicial vacations.<sup>9</sup>

§ 3. **Parties—Fundamental Rules.**—Considering the infinite variety of circumstance to be found in human affairs, and the lack of any rigid category of equitable actions, it is not strange that it has proven very difficult to formulate simple, brief and comprehensive rules governing the subject of *Parties*. “The truth is,” says Mr. Justice Story, “that the general rule . . . does not seem to be founded on any positive and uniform principle; and, therefore, it does not admit of being expounded by the application of any universal theorem as a test. . . . Whether, therefore, the common formula be adopted, that all persons materially interested in the *suit*, or in the *subject* of the suit, or that all persons materially interested in the *object* of the suit, ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable indeed, as a practical guide, but is still open to exceptions, qualifications and limitation, the nature, extent and application of which are not, and cannot, independently of judicial decision, be always clearly defined.”<sup>10</sup>

The fundamental rule, as in all civilized procedure, is that the right of no man ought to be determined in his absence. Corollary to this is, that the decree must so dispose of the subject-matter as to quiet the whole question, and not to expose those before the court, complying with and accepting the decree, to legal or equitable assaults launched by others claiming related, but unadjudicated interests. Taken literally, these rules are the expression of an aim and an aspiration. They are subject to apparent (and even actual) exceptions, based partly upon the doctrine of representation, and

<sup>8</sup> Rule 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> Equity Pleading, Sec. 76c.

partly upon the notion that in certain situations partial relief ought to be afforded by a court of conscience to the parties before it, though that complete and final adjustment, which is its general goal, be impossible or impracticable of accomplishment.

§ 4. **Plaintiffs—Real Party in Interest.**—The new rules contain a number of definite provisions respecting parties. Some of these dealing, mainly with the omission and dispensability of parties, are derived from the older rules. The innovations are adopted from the Code of Civil Procedure. Personally, I do not feel that the changes have rendered obsolete the great mass of learning heaped around the subject by previous decisions; and I fear the difficulties which eluded the enormous industry of Story have not been escaped by following Field.

Addressing ourselves to *plaintiffs* the basic canon is that "every action shall be prosecuted in the name of the real party in interest."<sup>11</sup> The code adjudications as to the meaning of "real party in interest" are not entirely harmonious.<sup>12</sup> Upon the face of the language, "real party in interest" would seem to be clearly allied with "the party for whose benefit the action is prosecuted."

The term has sometimes been defined as the party entitled to the avails of the suit; as the person vested with the beneficial ownership, rather than the technical title; as the one to be benefited or injured by the result of the litigation. Many states range, however, under this term the holder of the legal title; and have held, for example, that an agent or assignee for collection merely, holding the legal title may sue as the real party in interest. It is too soon to lay down the Federal rule; and, in view of the broad provisions for representation, the question can seldom arise.

It has been a source of some consideration with me, whether or not, assuming such an assignee to be the real party in

<sup>11</sup> Rule 37.

<sup>12</sup> Cf. 30 Cyc., p. 76, *et seq.*; *Stewart v. Price*, 64 L. R. A. 581.

interest he may aggregate his claims (each too small in individual amount) so as to make up the jurisdictional limitation. The assignment of such claims at law, under the conformity act, does not have this effect, even in code states; and, by analogy, there should be no difference in equity.<sup>13</sup>

The effect of the general rule, as framed in the code, was largely *substantive*, converting what had been equitable rights into rights regarded, for purposes of enforcement, as legal.

As applied to equity, it would mean that, in an appeal to that tribunal, there can be no representation of another's *substantial right*, whether such right be equitable or legal. In every case there remains to be determined what shall be considered as the *substantial right* to be protected and to whom, for the purposes of the action, it shall be deemed to belong. There is no duty, however, imposed upon the court, *sua sponte*, to investigate plaintiff's capacity.<sup>14</sup>

§ 5. **Right of Representation—State Laws.**—So sweeping a denial of the right of representation is immediately followed by a long list of excepted cases, in which representation is to be permitted. "An executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a person expressly authorized by statute, may sue in his own name, *without joining with him the party for whose benefit the action is brought.*"<sup>15</sup>

These exceptions are not to be taken, however, in unrestricted literal import. True representation involves the absolute conclusion of the party represented.

I do not understand that an executor, for example, can sue except with respect to some right or property under his control and subject to his administration as such. The actual dominion over the subject-matter must be vested in the representative, or actual authority conferred, before there can

<sup>13</sup> Cf. *Woodside v. Beckham*, 216 U. S. 117.

<sup>14</sup> *Kardo Co. v. Adams*, 231 Fed. 950.

<sup>15</sup> Rule 37.



be valid representation with respect to that subject-matter. A cannot be arbitrarily designated as having power to sue for B, and cause B to be irrevocably bound by the judgment. The dominion and the authority of an executor with respect to particular subject-matters are fixed and determined by state laws. The relationship and its incidents are within the control of the state. I therefore understand the rule to mean, that where requisite dominion and authority to represent have been conferred by state laws, the executor, for example, may sue in a federal court of equity in his own name, without the joinder of the persons beneficially interested. So the party expressly authorized by statute would mean authorized by state statute, except where the relationship fell within the regulative power of Congress.

If the foregoing is true, what of the "party with whom or in whose name a contract has been made for the benefit of another?" Has the United States the right to confer, by rule of court, upon any party with whom a contract has been made for the benefit of another, the right to represent and bind that other in litigation over the contract, regardless of the rules fixed by state statute or decision as to the nature of the relationship between such parties? The framers of the new rules would seem to have had no fear of complication upon this point; and to have either determined that the state laws were the same, or that upon historical grounds, the relationship between the parties justified the enactment of the rule.<sup>16</sup>

§ 6. **Representation—Class Suits.**—In further pursuance of the doctrine of representation, it is provided that "when the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue . . . for the whole."<sup>17</sup> This is a fusion of the two

<sup>16</sup> For an instance of suit by the party with whom the contract is made, Cf. *Magruder v. Belle Fourche, Etc., Co.*, 219 Fed. 72.

<sup>17</sup> Rule 38; Cf. *Merchants Ass'n v. U. S.*, 231 Fed. 292.

classes provided for by a familiar code provision; and is analogous to the pre-existing equity law.<sup>18</sup>

It was required by the older equity procedure that in every such case there must be such parties before the court as to insure a fair hearing in behalf of all,<sup>19</sup> and this, I think, must still be the law. The older practice demanded more than an interest in the mere legal question or principle involved; and a community of interest in the *subject matter* of the suit was essential.<sup>20</sup>

The Code provision has usually been treated as an attempted formulation of the equity practice; but the decisions in code states as to what shall be considered a question of "common or general interest" are by no means harmonious.<sup>21</sup> An interesting and difficult classification is demanded by the omission of the last clause of old Rule 48, reading as follows: "But in such cases the decree shall be without prejudice to the right and claims of absent parties."

As applied to the technical class-suit, represented by *Smith v. Swormstedt*<sup>22</sup> and *York v. Pilkington*,<sup>22a</sup> and *Commissioners v. Gellatly*,<sup>22b</sup> conclusion of all parties is the undoubted chancery rule.<sup>23</sup> Such difficulties as have arisen

<sup>18</sup> Pomeroy on Code Remedies, 4th Ed., Sec. 289; *Beatty v. Kurtz*, 2 Pet. 566; *Smith v. Swormstedt*, 16 How. 288; *Bacon v. Robertson*, 18 How. 480; *Wallace v. Adams*, 204 U. S. l. c. 425; *Watson v. National, Etc., Co.*, 162 Fed. 7; *Hartford Life Ins. Co. v. Ibs*, 237 U. S. l. c. 672.

<sup>19</sup> *U. S. v. Old Settlers*, 148 U. S. l. c. 480; *McArthur v. Scott*, 113 U. S. 340; *American Steel Co. v. Wire Drawers' Union*, 90 Fed. 598.

<sup>20</sup> *Scott v. Donald* (No. 2) 165 U. S. 107; *Cutting v. Gilbert*, 5 Blatchf. 259; *Baker v. Portland*, 5 Sawy. 566; Cf. language in *Smith v. Swormstedt*, *supra*; and see *Little v. Hanner*, 208 Fed. 605; *Raich v. Truax*, 219 Fed. l. c. 283.

<sup>21</sup> Cf. Bliss on Code Pleading, 3rd Ed., Sec. 79, *et seq.*; Pomeroy on Code Remedies, 4th Ed., Sec. 289.

<sup>22</sup> 16 How. 288.

<sup>22a</sup> 1 Atkyns 282.

<sup>22b</sup> 45 L. J. (Ch.) 788.

<sup>23</sup> Cf. *Wallace v. Adams*, 204 U. S. l. c. 425.

under the code, have arisen because of failure to properly classify the cause.<sup>24</sup>

§ 7. **Joinder of Plaintiffs.**—For the joinder of plaintiffs there is one mandatory rule, namely, that: “Persons having a *united interest* must be joined on the same side as plaintiff, . . . but when any one refuses to join, he may for such reason be made a defendant.”<sup>25</sup> By the term “united interest” is meant substantially a joint interest.<sup>26</sup>

It was the chancery rule that the interests of co-plaintiffs must be consistent,<sup>27</sup> and that distinct and disconnected claims could not be joined in the same bill.<sup>28</sup> A recent case holds that joinder of party plaintiff having no interest is still ground for dismissal as multifarious.<sup>29</sup>

The test of the new rules for consistency and common interest is laid down as follows: “All persons having an interest in the subject of the action, and in obtaining the relief demanded, *may* join as plaintiffs,”<sup>30</sup> which is illustrated by the joinder of owner and lessee of copyrighted picture films in action for infringement.<sup>31</sup> There is a further provision that “any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause,”<sup>32</sup> which is probably broad enough to include plaintiffs, though its usual application will be to defendants, to whom we now advert.

§ 8. **Joinder of Defendants.**—“Persons having a united interest *must* be joined on the same side as defendants,” and

<sup>24</sup> Pomeroy on Code Remedies, 4th Ed., Sec. 295, *et seq.*; Black on Judgments, Sec. 545.

<sup>25</sup> Rule 38.

<sup>26</sup> Bliss on Code Pleadings, 3rd Ed., Sec. 61, *et seq.*

<sup>27</sup> Grant v. Schoonhoven, 9 Paige, 255; Parsons v. Lyman, 4 Blatchf. 432; Bunce v. Gallagher, 5 Blatchf. 481; Saumurez v. Saumurez, 4 Myl. & Cr. l. c. 337.

<sup>28</sup> Yeaton v. Lenox, 8 Pet. 123; Baker v. Portland, 5 Sawy. 566.

<sup>29</sup> See Tully v. Triangle Co., 229 Fed. 297.

<sup>30</sup> Rule 37.

<sup>31</sup> Gaumont v. Hatch, 208 Fed. 378.

<sup>32</sup> Rule 37.

there too must be placed a recalcitrant joint plaintiff, as heretofore stated.<sup>33</sup> The general looseness of the old chancery practice with respect to the joinder of defendants is crystallized into the rule that "any person may be made a defendant who has or claims an interest adverse to the plaintiff."<sup>34</sup>

The representation of defendants is provided for in cases where "the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court;" and in such cases one or more (sufficiently representative) may defend for all.<sup>35</sup> "Any person may be made at any time a party, if his presence is necessary or proper to a complete determination of the cause;"<sup>36</sup> which provision is more usually applicable to parties defendant. This right of joinder ought not, I think, to be considered as absolute, under any and all circumstances, but as subject to equitable discretion on the part of the court.<sup>38</sup>

**§ 9. Indispensable and Necessary Parties.** — All courts of equity and especially those of the United States (owing to the restricted nature of the jurisdiction) deem it more equitable, under certain circumstances, to waive their usual insistence upon the settlement of every phase of a controversy, and to endeavor to do substantial justice to the interests before them.

Thus has arisen the doctrine of *dispensable parties*. This term is not usually employed in the decisions, but it is convenient and may be said to have an established place in legal terminology. By a *dispensable party* is meant a party who,

<sup>33</sup> Rule 37.

<sup>34</sup> *Ibid.*

<sup>35</sup> Rule 38; Cf. *Hill v. Eagle Glass Co.*, 219 Fed. 719.

<sup>36</sup> Rule 37; but, *semble*, Court will not order owner of a patent to be joined as a party in order that licensee may counterclaim for infringement. *Electric Boat Co. v. Lake, Etc., Co.*, 215 Fed. 377; Cf. *Ex parte Equitable Trust Co.*, 231 Fed. 571; *Atlas Underwear Co. v. Cooper Co.*, 210 Fed. 347.

<sup>38</sup> Cf., however, latter part of Rule 43.

under all or particular circumstances, may be omitted from a proceeding in equity, without preventing the court from hearing the cause and rendering a decree as to the parties before it. The contrary and complementary term is *indispensable party*.

Under the head of dispensable parties may be ranked the parties spoken of in the reports as (1) Nominal, (2) Formal, (3) Proper, and (4) Necessary.

There is not much difficulty as to the general meaning of *indispensable party*. Such a party is one having an interest in the *controversy* before the court "of such nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be (i. e. would be) wholly inconsistent with equity and good conscience;" in other words, the rights of those present are equitably inseparable from the rights of those absent.<sup>39</sup>

Another great judge has defined such parties as being those whose interest in the subject-matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an *absolute necessity*, without which the court cannot proceed;" in other words, such parties are *absolutely*, not conditionally, necessary.<sup>40</sup>

Taking up the term *necessary*, as descriptive of parties, its proper meaning is *conditionally necessary*.<sup>41</sup>

In drawing the distinction between the various parties in equity, Mr. Justice Bradley declares the true rule to be as follows: "First: Where a person will be directly affected by a decree, he is an *indispensable* party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Second: Where a person is interested

<sup>39</sup> *Shields v. Barrow*, 7 How. 130; *O'Neill v. Wolcott Mining Co.*, 174 Fed. 527.

<sup>40</sup> *Barney v. Baltimore*, 6 Wall. 280.

<sup>41</sup> *Shields v. Barrow*, 7 How. 130; *California v. Southern Pac. Co.*, 157 U. S. 229.

in *the controversy*, but will not be directly affected by a decree made in his absence, he is not an indispensable party, *but should be made a party if possible*, and the court will not proceed without him, *if he can be reached*.”<sup>42</sup>

I understand that the second class set out by Judge Bradley, constitutes those who are to be properly designated as *necessary* parties. Judge Caldwell of the Eighth Circuit defines necessary parties to be those “who have an interest in the *controversy*, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does full and complete justice between them;” and such parties *should* be brought before the court, and may only be dispensed with where they are beyond the territorial jurisdiction or when their joinder would oust the jurisdiction of the cause.<sup>43</sup>

Such parties are elsewhere described as those “Having an interest *in the controversy*, and who *ought* to be made parties that the court may act on the rule which requires it to decide on and finally determine the whole controversy and do complete justice, by adjusting all the rights involved in it;” but that interest is so separable from the interests of those before the court that the latter may nevertheless be equitably adjudicated, i. e., without either affecting the rights of the absent or rendering a decree so inconclusive as to be absolutely inconsistent with the fundamental notion of final and complete justice.<sup>44</sup>

§ 10. **Proper Parties.**—Taking up the term *proper*, as applied to parties, we begin to get into difficulties. The leading cases of *Barney v. Baltimore*,<sup>45</sup> *Shields v. Barrow*<sup>46</sup> and *Williams v. Bankhead*,<sup>47</sup> all recognize three and only three classes of parties in the equity jurisprudence of the United

<sup>42</sup> *Williams v. Bankhead*, 19 Wall. 563.

<sup>43</sup> *Chadbourn v. Coe*, 51 Fed. 479.

<sup>44</sup> *Shields v. Barrow*, 7 How. 130.

<sup>45</sup> 6 Wall. 280.

<sup>46</sup> 7 How. 130.

<sup>47</sup> 19 Wall. 563.

States. While there is an occasional tendency to use necessary in the old chancery sense as meaning *indispensable*, we have accounted with reasonable clarity for two of these three classes: viz., (1) *indispensable* and (2) *necessary* parties. If the trichotomy recognized by the Supreme Court is exhaustive, then logically the terms *proper*, *formal* and *nominal* must either be synonymous as referring alike to the remaining class; or one or more of these terms must include or be identical with one or more of the two preceding classes; or the terms now demanding analysis are of so loose a meaning as to be entitled to no consideration in a scheme of nomenclature.

The Eighth Circuit is of the opinion that the term "proper" applies to and includes all parties not *indispensable*; in other words, that the term *proper* is synonymous with *dispensable*,<sup>48</sup> and some of these cases have been cited many times in the inferior federal courts. In *Barney v. Latham*,<sup>49</sup> the Supreme Court declares that certain persons were not *indispensable* parties, and that it was not necessary to decide whether they were *proper* parties, which would indicate the same complete opposition of the terms. The same doctrine is laid down by Pomeroy on Code Pleadings,<sup>50</sup> and in a note to section ninety-six of the third edition of Bliss on Code Pleading.

Nevertheless, in *Kelley v. Boettcher*,<sup>51</sup> the same Eighth Circuit says that "a proper party, as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the *subject matter* of the litigation which may be conveniently settled therein."

Assuming that *necessary* is employed in its proper technical sense this would make *proper* synonymous with the meaning given by the Supreme Court to *formal* as we shall shortly see; and the combination of these terms in *Williams v. Bankhead* may be adverted to.

<sup>48</sup> *Sioux City, Etc., Co. v. Trust Co.*, 82 Fed. l. c. 126; *Silver King Co. v. Mining Co.*, 204 Fed. l. c. 169; *Rogers v. Penobscot, Etc., Co.*, 154 Fed. l. c. 610; *O'Neill v. Mining Co.*, 174 Fed. l. c. 536.

<sup>49</sup> 103 U. S. 205.

<sup>50</sup> 4th Ed., Sec. 226.

<sup>51</sup> 85 Fed. l. c. 64.

The truth is, that American judges (in common with their English brethren) frequently forget that careful terminology is an absolutely indispensable prerequisite to clarity of legal conception. The development of this whole system of classification has been comparatively recent, and the border lines have not been clearly stamped out. We search in vain the first edition of Daniell on Chancery Practice, Cooper's Equity Pleading, Calvert on Parties, Mitford on Equity Pleadings and even the text of Story himself for any such scheme of division. Story occasionally speaks of parties being indispensable, sometimes employs necessary in the sense of indispensable, but uses proper and necessary concurrently and with little, if any, apparent consciousness of distinction between them.

A careful reading of old equity rule 47 would seem to indicate that the framers of that rule intended the same regulation to apply to both necessary and proper parties which are thereby put upon a legal parity. Some of the older text-books display the same tendency; and a similar deduction may be made from the fourth clause of Rule 25.

§ 11. **Formal or Nominal Parties—Criticism.**—The third class laid down by the Supreme Court in *Shields v. Barrow*,<sup>52</sup> is designated *formal parties*. Assuming that the third class in *Williams v. Bankhead*,<sup>53</sup> is identical, a *formal* party is one who "is not interested in the controversy between the immediate litigants, but has an interest in the *subject matter* which may be conveniently settled in the suit and thereby prevent further litigation . . ." and "he may be a party or not, at the option of the complainant."<sup>54</sup>

This identity is directly declared in the lower federal courts.<sup>55</sup>

I think that this class of parties might well be designated as *proper*, leaving the designation of formal or nominal to apply

<sup>52</sup> 7 How. 130.

<sup>53</sup> 19 Wall. 563.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Chadbourn v. Coe*, 51 Fed. l. c. 480.



to a different scheme of classification, to which our attention may be briefly directed.

In *Wortley v. Wortley*<sup>56</sup> a married woman and her children brought a bill to establish a trust arising out of a marriage settlement. The complainants brought the suit by next friend and the husband was one of the defendants. It was objected that as the action rested on diversity of citizenship, and the citizenship of the husband was the same as that of the wife, there could be no jurisdiction in the federal court. The court, by Mr. Justice Story, used the following language: "An objection has been taken to the jurisdiction upon the ground that Wortley, the husband, is made defendant. . . . But Wortley is but a *nominal* defendant, joined for the sake of conformity in the bill, against whom no decree is sought. He voluntarily appeared, though perhaps he could not have been compelled to do so. Under these circumstances, the objection has no good foundation.

"The Court will not permit its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties who have the *real* interests before it, whenever it can be done without prejudice to the rights of others."

In *Wood v. Davis*,<sup>57</sup> the jurisdiction was resisted on the ground that certain defendants were residents of the same state with the plaintiff. The Court said: "It has been repeatedly held by this Court that *formal* parties or *nominal* parties, or *parties without interest*, united with the *real* parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it. . . . It would be difficult to state a case of parties more destitute of interest, or in which they were used merely as *formal* parties, than in the case of the defendants. They were simply agents of Wood, Abbott & Co., with special instructions in which the complainant had no participation,

<sup>56</sup> 8 Wheat. 421.

<sup>57</sup> 18 How. 467.

and which could be recalled at any time, before carried into execution. . . .”

In *Walden v. Skinner*,<sup>58</sup> the Court says: “Jurisdiction as between the complainant and respondent is unquestionable, and, if so, it is clear that the fact that the trustee, if living, was a citizen of the same state with the complainant would not defeat the jurisdiction in a case where he is a mere *nominal* party and is joined merely to perform the ministerial act of conveying the title if adjudged to the complainant. . . . Where the *real* and only *controversy* is between citizens of different states, or an alien and a citizen, and the plaintiff, by some positive rule of law, is compelled to use the name of some other to perform merely a ministerial act, who *has not nor ever had any interest in or control over it* the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists.”

Many other citations could be set forth of similar import.<sup>59</sup> In other words, the terms *nominal* and *formal* have been long used to mark the difference between *nominal* and *real* actors in the federal courts; to separate those who have no substantial interest of their own from those having a substantial interest in the subject matter of the suit, regardless of whether the proceeding be at law or in equity. It may be that in equity the distinction attempted is unimportant, because frequently the classes coincide. Nevertheless the change would leave us our three classes of indispensable, necessary and proper parties; and would leave *nominal* or *formal* as the legal contrary to *real* parties in both courts. I question furthermore the complete soundness of a rule that would disregard as formal, without a previous dismissal, the citizenship of a party interested in the *subject matter* of the suit, made a party for the purpose of binding and concluding that interest.

§ 12. **Rules Dispensing With Parties.** — Declaratory of these general doctrines a number of rules deal with the dis-

<sup>58</sup> 101 U. S. 577.

<sup>59</sup> *Brown v. Strode*, 5 Cranch. 303; *McNutt v. Bland*, 2 How. 9; *Florida v. Anderson*, 91 U. S. 667; *Coal Co. v. Blatchford*, 11 Wall. 172.

pensability of parties. It is provided by Rule 39, that persons who would be "proper parties," may be omitted at the discretion of the Court, where they are out of the jurisdiction, or their joinder would destroy the jurisdiction of the cause, or where they are otherwise incapable of being made parties; but it is especially provided that in such cases the decree shall be without prejudice to the rights of the absent.<sup>60</sup>

By Rule 41, in suits to execute the trusts of a will, it is not necessary to make the heir-at-law a party, unless the will is to be established and confirmed against him.

A party against whom no account, payment, conveyance or other direct relief is sought (not being an infant) is treated as a nominal defendant by Rule 40. He is bound by the proceedings in the cause, but need not appear and answer, unless thereto specially required by the prayer of the plaintiff's bill; and if so specially required, the plaintiffs must pay the costs of all proceedings against him, unless an order to the contrary is made by the court.

It is further laid down by Rule 42, that where a demand is joint *and* several, against several persons, either as principals or sureties, the plaintiff may proceed against any, some or all the persons severally liable.

§ 13. **Objection for Want of Parties.**—Where parties are omitted by the plaintiff, the defendants ought not to sit idly by while expensive and laborious proceedings are being taken, and then object at the final hearing to the making of any decree. If such an objection is to be insisted upon, it should be made at the earliest opportunity, by motion or by answer, and if this is not done, the court will feel itself at liberty, on the hearing, if such a course be possible, to make a decree, saving the rights of the absent parties.<sup>61</sup>

The motion or answer should set forth the omitted parties and the nature of their interests.<sup>62</sup>

<sup>60</sup> Declaration of former practice: *Thomas v. Anderson*, 223 Fed. 41.

<sup>61</sup> Rule 44.

<sup>62</sup> *Ibid.* Cf. *Sheffield Iron Co. v. Newman*, 77 Fed. 787.

Where the objection is made by answer, the plaintiff may move within fourteen days to set the cause down for argument on that point only; and if he does not do so, he shall not be entitled as of course to an order on the hearing, permitting him to amend his bill by adding parties; but the court may impose terms or dismiss his bill as deemed consonant with justice.<sup>63</sup>

§ 14. **Incompetent Parties.**—We need spare but a glance at the general capacity or incapacity of parties to sustain as plaintiff or defendant an action in equity. Enough for all practical purposes can be gathered from the third chapter of Story. Only one of the new rules deals with suits by and against incompetents.<sup>64</sup>

It provides that an infant or other incompetent may sue by guardian, if any (vested with the requisite authority); or by *prochein ami*. Where a suit is brought *against* an infant or incompetent, it is to be defended by a guardian *ad litem*, appointed by court; and whether they be plaintiff or defendant, the court, according to its immemorial tradition, will make all proper orders for their protection.<sup>65</sup>

§ 15. **Intervention—Origin.**—In connection with parties we must consider the nature of intervention.

The sole *express* statutory reference to this subject is in the latter portion of Rule 37, reading as follows: “Any one claiming an *interest in the litigation* may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination, to, and in recognition of the propriety of, the main proceeding.”

Now it was long ago laid down, “as an established rule, that nothing under the great seal can issue but *inter partes*.”<sup>66</sup>

Calvert says that “generally speaking, a *stranger* can take

<sup>63</sup> Rule 43.

<sup>64</sup> Rule 70.

<sup>65</sup> *Ibid.*

<sup>66</sup> Dickens, 798.

no part at all, and cannot even be heard by counsel in a claim of interest in the suit, except by consent of all the parties.’’<sup>67</sup>

Of course, where there was a change of interest, the necessary new parties might have been brought in by supplemental bill or bill of revivor; and in a note to the passage just cited, Calvert sets out a number of exceptional instances, where for the sake of justice, the court recognized the existence of strangers.

In the main, however, the plaintiffs were the masters of their suit and could not be compelled by the court to admit others, unless such other constituted necessary parties (in the old sense) in whose absence the court would decline to hear or dismiss the bill.

I find no mention, for example, of intervention in Story’s Equity Pleadings, and Chitty’s General Practice<sup>68</sup> says that it is unknown to courts of law and equity, but is admitted in ecclesiastical courts. He cites an ecclesiastical case in which the judge observed that “the principle of the law of intervention is, that if any third person consider that his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants, but has a right to *intervene, or be made a party to the cause*, and take on himself the defense of his own rights, provided he does not disturb the order of the proceedings.’’<sup>69</sup>

There was, however, recognized in early Chancery practice, the right of a person whose property had been taken into the custody of the court by sequestrators or receivers, to petition the court for a release thereof. This was known as a petition *pro interesse suo*.<sup>70</sup>

Furthermore, a claimant of a particular interest, who was substantially represented by others who were parties, was re-

<sup>67</sup> Calvert on Parties, p. 60; note exception in Rule 11.

<sup>68</sup> Vol. 2, p. 492.

<sup>69</sup> Cf. Florida v. Georgia (opinion of Justice Campbell), 17 How. 478; Phillimore, Eccl. Laws, 2nd Ed., 958; Burn, Eccl. Law, 9th Ed., Vol. 3, 185.

<sup>70</sup> Angel v. Smith, 9 Ves. Jr. 335; Smith’s Chancery Practice (1839) p. 450, *et seq.*; Daniell’s Chancery Practice, 1st Ed., p. 644, *et seq.*

garded, not as a *stranger*, but as a *quasi party*, and might usually obtain leave to go in before the master.<sup>71</sup>

It is not a great step to extend the doctrine of intervention where equity demanded it, to cases where persons claimed such an interest in the subject matter to be affected by the issues, as to require such persons to intervene for the protection of their own interests; even though such intervention made them substantial parties, and conferred upon them the right to support, attack or modify some of the original issues.

§ 16. **Intervention—Two Aspects.**—The federal reports contain a great and undigested mass of cases dealing with this subject. It is to be regretted, however, that no comprehensive and logical treatment has ever been attempted, and the precise limits of the right are difficult to accurately state. The foundation and starting point should seem to have been (1) the theory which forbids other courts of co-ordinate jurisdiction from interfering with actual judicial custody of property, and (intimately associated therewith) (2) the notion that every court is an instrument of justice rather than injustice, and that its practice must be so shaped as to avoid grievous wrong to others not technically parties. I think a third notion has attended the matter, viz.: (3) that a court of equity will endeavor to do complete justice, in so far as consistent with the fundamental necessity of adequate and orderly procedural method.

There are two general aspects of intervention, as it seems to me, which may be summarized respectively as follows: (a) an intervention merely to assert a title, interest, lien or claim in or against property or funds under the dominion of the court; and (b) an intervention for the purpose of contesting or asserting, as plaintiff or defendant, one or more issues involved in or constituting a part of the principal action or proceeding.

Of course, even in the second aspect, the intervening parties must have an interest in the property or right affected by the suit; because otherwise, there would be no conceivable reason for admitting them at all.

<sup>71</sup> Calvert on Parties, p. 58.

As examples of the first aspect, the following instances may be cited:

A telegraph company which claims the right to build its line along the track of a railroad company in the hands of a receiver was permitted to file its intervening petition to establish its right.<sup>72</sup>

A landlord may file his intervening petition to recover out of the funds in court rent of office-room by a former receiver and to prevent the cancellation of his lease.<sup>73</sup>

An intervening bill was proper, on the part of the city and its licensee railroad company, against the receivers, under foreclosure proceedings, of the Wabash Railway Company to compel the latter to perform a contract made with the city to admit its licensees to a joint use of certain tracks.<sup>74</sup>

So where an action was brought by the United States to charge the holder of certain securities, as a trustee ex maleficio, for the benefit of the United States, an intervention may be allowed to a person who charges that the securities are affected with a prior trust to secure the intervenor, as bail for a federal prisoner, whose bond had been forfeited, and the United States are proceeding elsewhere to enforce the judgment of forfeiture.<sup>75</sup>

In *Quincy, Etc., R. R. Co. v. Humphreys*,<sup>75a</sup> the lessor railroad company filed an intervening petition asserting that the receivers of the lessee company had adopted the leases, and the rentals should be charged as preferential liens against the assets in the hands of the receivers and superior to the mortgages sought to be foreclosed.

So judgment creditors of a corporation in the hands of a receiver may intervene for the purpose of proving their judgment against the assets liable to pay them,<sup>76</sup> and holders of prior claims on funds in the hands of a court of equity for ad-

<sup>72</sup> *Mercantile Trust Co. v. Atlantic, Etc., Co.*, 63 Fed. 513.

<sup>73</sup> *Chicago Vault Co. v. McNulta*, 153 U. S. 554.

<sup>74</sup> *Joy v. St. Louis*, 138 U. S. 1.

<sup>75</sup> *Léary v. U. S.*, 224 U. S. 567.

<sup>75a</sup> 145 U. S. 82.

<sup>76</sup> *Atlantic Trust Co. v. Dana*, 128 Fed. 209.

ministration may intervene and prove their claims on the funds.<sup>77</sup>

Other instances may be found in the treatment of ancillary proceedings.

§ 17. **Who May Intervene as Party.**—Turning to the second aspect, it is the general rule still, as I understand it, that strangers cannot, without the consent of the plaintiff, inject themselves upon their own application as actual parties into a cause, whether as plaintiff or defendant.<sup>78</sup>

There are, however, undoubted exceptions to this general statement. Most, if not at all, these exceptions may be kept in mind by distinguishing between *strangers* and *quasi parties*. I do not think that the term *quasi party* has attached to it any clear and definite meaning.

For the purposes of our exceptions, I shall say that *quasi parties* may be generally regarded as:

- (1) Members of a class for or against whom the bill professes to be filed.<sup>79</sup>
- (2) Creditors in creditors' bills and similar proceedings.<sup>80</sup>
- (3) Beneficiaries represented by trustees or quasi-trustees.<sup>81</sup>

<sup>77</sup> French v. Gapen, 105 U. S. 509.

<sup>78</sup> Drake v. Goodridge, 6 Blatchf. 151; Lombard Investment Co. v. Seaboard Mfg. Co., 74 Fed. 325; Stretch v. Stretch, 2 Tenn. Chy. 140; Chester v. Life Ass'n, 4 Fed. 487; Gregory v. Pike, 67 Fed. 837; Anderson v. R. R. Co., 2 Woods, 628; Searles v. R. R. Co., 2 Woods, 625; Shields v. Barrow, 17 How. 145; Coleman v. Martin, 6 Blatchf. 119; Toler v. East Tenn. Ry. Co., 67 Fed. 168; Daniell's Chy. Practice, 6th Am. Ed., p. 286, note.

<sup>79</sup> Chester v. Life Ass'n, 4 Fed. 487.

<sup>80</sup> Myers v. Fenn, 5 Wall. 205; Belmont Co. v. Columbia Co., 46 Fed. 336; Illinois Steel Co. v. Ramsey, 176 Fed. 853; Toler v. East Tenn. R. R. Co., 67 Fed. 168.

<sup>81</sup> *Ibid.* Stretch v. Stretch, 2 Tenn. Ch. 140; Chester v. Life Ass'n, 4 Fed. 487; Farmers, Etc., Co. v. R. R., 53 Fed. 182; Fidelity Trust Co. v. Ry. Co., 53 Fed. 850; Jones v. Sands, 79 Fed. 913.



§ 18 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

(4) Stockholders in suits where the corporation is a party.<sup>82</sup>

(5) Persons named as parties, and not served with process, who come within the jurisdiction and apply for admission as parties.<sup>83</sup>

(6) Cases where there has been a change of interest, *pendente lite*.<sup>84</sup>

It cannot be denied that there are a number of cases difficult to classify, and that the attempted classification is not logically sound. An especially interesting case is *In re Metropolitan Railway Receivership*, where a federal court appointed, on the petition of creditors, a receiver for an insolvent street railway company, and permitted another company, which was closely tied up with the first, by leases and other arrangements, to become a *party defendant* and extended the receivership to it also.<sup>85</sup>

A broader and perhaps more accurate statement would be that new parties may be admitted to the issues, whenever their presence is necessary for the protection of their rights; but that in most instances their rights can be protected in another and more orderly fashion.

§ 18. **Method of Intervention—Meaning of “In Harmony With.”**—Intervention in the first general aspect may be made more properly, in many instances, by a sort of formal and ancillary bill;<sup>86</sup> in others by a petition *pro interesse suo*, or by coming in before the master under the terms of the decree.

In any case, save where an appropriate order has already

<sup>82</sup> *Bronson v. R. R. Co.*, 2 Wall. 283; *Hamlin v. Toledo Ry. Co.*, 78 Fed. 664; *Forbes v. R. R. Co.*, 2 Woods, 323; *Bayliss v. Lafayette Co.*, 8 Biss. 153; *Ex parte Cutting*, 94 U. S. 14; *Lewis v. R. R. Co.*, 62 Fed. 218.

<sup>83</sup> *Chester v. Life Ass'n*, 4 Fed. 487.

<sup>84</sup> *Ibid.* *Mellen v. Moline, Etc., Works*, 131 U. S. 352; *National Electric Co. v. Telefunken*, 208 Fed. 679.

<sup>85</sup> 208 U. S. 90.

<sup>86</sup> Cf. *Joy v. St. Louis*, 138 U. S. 1; see statement in *Krippendorf v. Hyde*, 110 U. S. 276.

been made, it is better practice to apply for leave to intervene, although frequently this is found apparently dispensed with in interventions of the first general aspect.

From another standpoint, interventions may be classified into (a) discretionary and (b) as of right. The granting or denial of leave to intervene is ordinarily within the discretion of the court, and that discretion will not be reviewed on appeal. On the other hand, there are cases where the denial of the right to intervene would be tantamount to the denial of all relief, because it could be practically obtained only by intervention or not at all. The latter might happen where there was a fund, for example, undergoing administration, which would be dissipated and put beyond effectual reach.

In such cases it is the duty of the chancellor to permit intervention, and an appeal will lie from the denial of the right.<sup>87</sup>

The foregoing, then, was the general situation respecting intervention at the time the new rule was passed. I confess I am somewhat puzzled by the provision that "the intervention shall be in subordination to and in recognition of the propriety of the main proceeding."

If the term, "intervention" as here used, be of general signification, then it embraces all aspects of intervention. It includes cases where parties are admitted as co-complainants upon their own application, and cases where, under similar circumstances, they are admitted as co-defendants, with the right to file answer and counterclaim; and it includes also all cases of intervention merely to assert a superior claim to property in the hands of the court and sought to be administered. A co-complainant was never admitted for the purpose of starting a cross-litigation with or destroying the case of the original complainant;<sup>88</sup> but it has been held in some cases, that a stock holder, for example, might be permitted to come in, for the protection of his interest, as a party defendant, and file an answer and cross bill, denying the consideration or validity of

<sup>87</sup> *Credits Commutation Co. v. U. S.*, 177 U. S. 1. c. 315.

<sup>88</sup> *Forbes v. R. R. Co.*, 2 Woods, 323.

the mortgage sought to be foreclosed, or alleging the fraudulent quality of a judgment, where the occasion demanded it.<sup>89</sup>

Such an intervention is hardly one "in recognition of the propriety of the main proceeding." Is such a proceeding hereafter absolutely forbidden? To so hold is to go counter to the whole spirit of the new rules. One of the committee who prepared the new rules, says that this provision merely restates the sound, pre-existing law. Or is the term "intervention" to be applied only to cases of the first general aspect? If so, is every assertion of a dominion or interest superior to that of the parties before the court, to be in recognition of the propriety of the main proceeding, which seeks to devote such property to inconsistent ends?<sup>90</sup>

It is, however, apparent that the words "claiming an interest *in the litigation*," forbid any such narrow interpretation.<sup>91</sup>

Probably nothing more is meant, than that the intervention, if permitted, shall not be of such a nature as to be repugnant to orderly procedure.

<sup>89</sup> Cf. *Bronson v. LaCrosse, Etc., R. R. Co.*, 2 Wall. 283; *Dickerman v. Trust Co.*, 176 U. S. 181; *Fidelity Trust Co. v. Mobile Ry. Co.*, 53 Fed. 850; *Bowling Green, Etc., Co. v. Virginia, Etc., Co.*, 132 Fed. 921; *Big Gap, Etc., Co. v. American, Etc., Co.*, 127 Fed. l. c. 633.

<sup>90</sup> Cf. language in *Lombard v. Seaboard, Etc., Co.*, 74 Fed. 325.

<sup>91</sup> Cf. *Hutchinson v. Philadelphia, Etc., Co.*, 216 Fed. 795.

## CHAPTER XI.

### EQUITY PROCEDURE—CONTINUED.

- § 1. The Bill—Joinder of Actions.
- 2. Stockholders' Bills.
- 3. Signature—Filing—Process. .
- 4. Methods of Defense—Demurrers and Pleas Abolished.
- 5. Defense of Matter Apparent—Setting Down Motion.
- 6. One Answer to Raise All Defenses—Jurisdiction of Person.
- 7. Answer—Contents.
- 8. Counter Claims—Two Classes—Scope of.
- 9. The Counter Claim of the Second Class.
- 10. Counter Claim of Second Class—Jurisdiction.
- 11. Reply—Answer to Counter Claim—Motion.
- 12. Indefiniteness—Impertinence—Transfer to Law Side—Legal Incident.
- 13. Amended and Supplemental Pleadings.
- 14. Trial—Exclusion of Evidence—Methods of Eliciting.
- 15. Discovery By Interrogatories.
- 16. Interrogatories—Subject Matter—Effect.
- 17. Depositions—Rules.
- 18. Depositions—Methods of Taking.
- 19. Affidavits.

§ 1. **The Bill—Joinder of Actions.**—Having thus disposed of Parties, the next consideration is the mode of pleading. The old bill in chancery, which was a complicated and involved structure, was simplified by the earlier rules; and now all technical *forms* of pleading in equity are abolished.<sup>1</sup>

In addition to the usual caption, the bill of complaint must contain (1) the full name (if known), the residence and citizenship of each party;<sup>2</sup> (2) a short and plain statement of the *grounds* upon which the court's jurisdiction depends; (3) a simple and brief statement of the ultimate facts constituting the foundation to relief, omitting any mere statement of evi-

<sup>1</sup> Rule 18.

<sup>2</sup> Cf. *State Lumber Co. v. Kingfield*, 218 Fed. 902.

dence;<sup>3</sup> (4) a statement why persons who would appear to be *proper* parties are omitted, if any; and (5) a prayer for any *special* relief pending the suit or on final hearing, which may be sought in alternative forms. Inconsistency in prayers is harmless, and *alternative* really connotes *mutually exclusive*;<sup>4</sup> no prayer for costs, or for process, or (save as to nominal parties) for answer, is necessary;<sup>5</sup> and there need be no waiver of answer under oath.<sup>6</sup> The prayer for general relief seems to be expressly omitted from the specification; nevertheless I fancy it will still be adhered to, for safety, until the court condemns its use. Whenever special relief pending the suit is sought, the bill must be verified by the plaintiff or by some one having knowledge of the facts.<sup>7</sup>

Most liberal provision is made for the joinder of causes of action. The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But a case resting upon a federal ground cannot be used as a vehicle to join another case between the same parties, resting on diversity, where there is no diversity.<sup>8</sup>

If there is diversity, or federal question, in such added or joined causes of action, it seems that district of suit is waivable.<sup>10</sup> All must be equitable.<sup>11</sup> There is no express requirement for separate statement, but if the statements of the bill are to be clear and plain, it would seem generally proper to separate the various causes and the relief sought in each, so

<sup>3</sup> Patent cases; recitation of conditions precedent; Cf. *Zenith Co. v. Stromberg Co.*, 205 Fed. 158; *General Bakelite Co. v. Nikolas*, 207 Fed. 111; *Maxwell v. Casket Co.*, 205 Fed. 515; *Pittsburgh Heater Co. v. Beler*, 222 Fed. 950.

<sup>4</sup> *Boyd v. R. R. Co.*, 220 Fed. 174.

<sup>5</sup> *Pittsburgh Heater Co. v. Beler*, 222 Fed. 1. c. 952.

<sup>6</sup> *Ibid.*

<sup>7</sup> Rule 25.

<sup>8</sup> *Vose v. Roebuck Co.*, 210 Fed. 687.

<sup>10</sup> *Ibid.* Cf. *Taylor v. Ludlow-Saylor Co.*, 212 Fed. 156; *U. S. Bolt Co. v. Kroncke*, 216 Fed. 186.

<sup>11</sup> *Bucyrus Co. v. McArthur*, 219 Fed. 266.

that they may be intelligibly distinguished; otherwise it seems to me the result might frequently be chaos.<sup>12</sup>

When there are several plaintiffs, and several causes of action are to be joined, the several causes must be joint as to all the plaintiffs. The requirement as to defendants is not so strict; and if there be several defendants, it is enough to justify the joinder that either (1) the liability be one that is asserted against all the material defendants or (2) that the convenient administration of justice will be promoted by uniting the various causes of action in one suit. If it appears that the various causes of action joined cannot be conveniently disposed of together, separate trials may be ordered.<sup>13</sup> A suit to foreclose two mortgages by separate corporations to secure the same debt has been allowed.<sup>14</sup> These provisions are drastic and cut deeply into the scope of the old objections for multifariousness.

§ 2. **Stockholders' Bills.**—There is one species of bills which calls for especial remark, namely, *stockholders' bills*. A stockholder's bill, in the sense here meant, is a bill brought by a shareholder, founded on rights belonging directly to, and properly to be asserted by the corporation itself. Its necessity usually arises from the fact that the corporate organization is being so perverted by the officers or other shareholders as to injure the lawful interests of the corporation, and thereby cause damage to the complaining stockholders. In *Hawes v. Oakland*,<sup>15</sup> decided on January 16th, 1882, the Supreme Court laid down the following propositions:

“We understand that doctrine to be, that to enable a stockholder in a corporation to sustain, in equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

“Some action or threatened action of the managing board of

<sup>12</sup> Cf. *Maxwell Co. v. National Casket Co.*, 205 Fed. 515.

<sup>13</sup> Rule 26.

<sup>14</sup> *Crawford v. Washington, Etc., Co.*, 233 Fed. 961.

<sup>15</sup> 104 U. S. 450.

directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization;

“Or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

“Or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders;

“Or where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.” The Court then cautiously adds that there may be other unusual causes, not included in the foregoing outline. It further lays down the rule that before resorting to the court in such cases, the shareholder must exhaust all his means of relief within the corporation, by application to the directors, and if unsuccessful there, and time permits, must make an honest effort to secure action by the stockholders as a body. This decision was in effect codified into old rule 94, which was promulgated just one week after the decision was rendered.

Under the provisions of new rule 27, such a stockholders' bill must be verified by affidavit, and must contain (1) an allegation that the plaintiff was a shareholder at the time of the transaction complained of, or that his shares since devolved upon him by operation of law; (2) a denial that the suit is collusively brought so as to confer jurisdiction upon the Federal Court over a cause not otherwise within its cognizance; (3) particular recitals of the plaintiff's efforts to secure action from the directors and shareholders, *or his reasons for not making such efforts*; (4) the causes of his failure to secure such action, if any such efforts were made.

The new rule differs from the old only in adding the last clause, reading: “or the reasons for not making such effort.”

The effect of this addition is to excuse the making of efforts, where they would be plainly unavailing, upon the principle that *lex non cogit ad vana*, which is in recognition of the law already frequently applied in the federal courts.<sup>16</sup> The rule really goes to the representative capacity of the plaintiff shareholder, rather than to the jurisdiction of the court, and might be relegated to the subject of parties.<sup>18</sup>

§ 3. **Signature — Filing — Process.** — After the bill has been drawn up, it must be signed (*like every other pleading*) by a solicitor of record; whose signature to any pleading is a certificate that he has read it, that it contains no scandal, that it is not interposed for delay, and that under the instructions laid before him there is good ground for its filing.<sup>19</sup>

It is then filed in the clerk's office with a *praecipe* (or usually a mere oral request) for process.<sup>20</sup> The initial process is the time-honored writ of *subpoena*, issued and attested by the clerk, as of course, requiring the defendant to appear and answer the bill.<sup>21</sup> At the foot thereof is a warning, that the defendant must file his answer or other defense on or before the twentieth day after service, excluding the day of service; and that unless he do so, the bill of complaint may be taken as confessed.<sup>22</sup> Where there are several defendants, the plaintiff may have, at his election, one joint subpoena for all, or separate and several writs for each defendant.<sup>23</sup>

The Marshal of the district or his deputy is the usual arm

<sup>16</sup> Cf. on old rule: *Delaware & Hudson Co. v. Albany*, 213 U. S. 435; *Bigelow v. Calumet Co.*, 155 Fed. 869; *Berwind v. R. R. Co.*, 98 Fed. 158; *De Neufville v. Ry. Co.*, 81 Fed. 10; Cf., however, *Quincy v. Steel*, 120 U. S. 241; *Corbus v. Alaska Co.*, 187 U. S. 455.

On new rule see *Kelly v. Dolan*, 218 Fed. 966; *Dana v. Morgan*, 219 Fed. 313; *Hyams v. Calumet Co.*, 221 Fed. 529; *Russell v. Shippen*, 224 Fed. 254; *Ross v. Iron Co.*, 227 Fed. 337.

<sup>18</sup> *Ill. Cent. Ry. Co. v. Adams*, 180 U. S. 28.

<sup>19</sup> Rule 24.

<sup>20</sup> Rule 12.

<sup>21</sup> Rule 12; Rule 7.

<sup>22</sup> *Ibid.*; to same effect, see Rule 16, which permits the time to be enlarged for cause shown.

<sup>23</sup> Rule 12.



of the Court for the service of all process; but the Court or judge may specially appoint another to perform this function, whose return must be verified by affidavit<sup>24</sup> If not served within twenty days from issuance, a corresponding return must be made, and an alias subpoena sued out.<sup>25</sup> Service may be made by delivery of a copy of the original subpoena to the defendant, or by leaving a copy at his dwelling house or usual place of abode, with some adult person who is a member of or resident in the family.<sup>26</sup>

We have heretofore spoken of service on corporations, and no especial provisions are made therefor in the equity rules.

**§ 4. Methods of Defense — Demurrers and Pleas Abolished.**—It is now up to the defendant to decide upon the course he shall pursue. At it will ordinarily be his policy to delay the possibility of judgment against him, his first step will be to deny the jurisdiction of the Court over his person. The process may be irregular or defective; the return of service, false or mistaken; or he may have been served in a district where, in the absence of waiver, he is privileged from suit. Under the chancery practice prior to the new rules, a general appearance amounted to an irrevocable acknowledgment that the Court had jurisdiction over his person for the purposes of that particular cause. Under that practice, objections of this character must have been made by the defendant “specially appearing for such purpose only,” and the objection to the jurisdiction over the person could never be coupled with a pleading to the merits, for the latter amounted to a general appearance, which avoided and swallowed up the concurrent special appearance. Nor could a continuance or time to plead be asked, for this was equally a confession by the defendant’s action that the Court had jurisdiction. In other ways the defendant might so logically submit himself to the

<sup>24</sup> Rule 15; of course this has no application to cases under publication statute.

<sup>25</sup> Rule 14; Rule 12.

<sup>26</sup> Rule 13; but does not exclude service of another sort in ancillary jurisdiction, where defendant non-resident is not found.

jurisdiction of the particular Court, as to preclude his subsequent objection.

For example, a demurrer raising jurisdiction and merits, was a general appearance.<sup>26a</sup>

Under the old rules the practice does not appear to have been well settled as to precisely how objections to the jurisdictions over the person should be made, under particular circumstances, whether by demurrer, plea or motion.<sup>26b</sup>

Under the new rules, demurrers and pleas have been expressly abolished by rule 29.<sup>27</sup> That rule provides in part as follows:

“Demurrers and pleas are abolished. *Every* defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder or insufficiency of fact to constitute a valid cause of action in equity, which might have heretofore been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the Court.

“Every defense heretofore presentable by plea in bar or

<sup>26a</sup> St. Louis, Etc., R. R. Co. v. McBride, 141 U. S. 127; Western, Etc., Co. v. Butte, Etc., Co., 210 U. S. 368; Peale v. Marion Coal Co., 172 Fed. 639; Lowry v. Tile, Etc., Ass’n, 98 Fed. 817; *contra*, cf. Davidson, Etc., Co. v. Gibson, 213 U. S. 10; Southern Pac. Co. v. Arlington, 191 Fed. 101.

<sup>26b</sup> Cf. Shaw v. Quincy Mining Co., 145 U. S. 444; Southern Pac. Co. v. Denton, 146 U. S. 202; Coal Co. v. Blatchford, 11 Wall. 172; Central Trust Co. v. McGeorge, 151 U. S. l. c. 132; Ladew v. Copper Co., 179 Fed. l. c. 248; Jenkins v. York Cliffs Co., 110 Fed. 807; American, Etc., Co. v. Pettijohn, 70 Fed. 276; Waterman v. Parker, 107 Fed. 141; Mexican Cent. Ry. Co. v. Pinkney, 149 U. S. 194; Hagstoz v. Insurance Co., 179 Fed. 569; Laskey v. Newton Mining Co., 50 Fed. 634; Meyer v. Herrera, 41 Fed. 65; Halstead v. Manning, 34 Fed. 565; Eldred v. Palace Car Co., 103 Fed. 209; Connors v. Vicksburg, Etc., Co., 36 Fed. 273; Municipal Investment Co. v. Gardner, 62 Fed. 954.

<sup>27</sup> Cf. *In re Jones*, 209 Fed. 717; Southwestern Surety Co. v. Wells, 217 Fed. 294; Weber v. Hertzell, 230 Fed. 965.

abatement *shall* be made in the answer, and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court." . . .

It would seem that two general classes of cases are here provided for: (1) Defenses in point of law arising upon the face of the bill . . . which might have heretofore been made by demurrer or plea; (2) Defenses heretofore presentable by plea in bar or abatement. The first class of defenses may now be made *either* by motion to dismiss *or* in the answer; the second class must be raised by the answer alone. The question is, what former proceedings are embraced in each of these classes?

§ 5. **Defense of Matter Apparent—Setting Down Motion.** —“Defense in point of law arising upon the face of the bill” must mean any defense not dependent upon extraneous facts, but evident upon the face of the bill itself, and assuming its allegations to be true. The rule means (apparently) that such defenses must be made either by motion to dismiss or by answer; the choice of either method being left open. If made in the answer, I assume that such defenses, for the sake of orderly procedure, should be stated separately. The rule includes such objections as misjoinder, non-joinder and insufficiency of fact to constitute a cause of action. It has been held that these three things are the *only* ones comprised.<sup>28</sup>

The words “*or plea*,” immediately following *demurrer*, are hard to understand in the light of the decision of the Supreme Court, in *Farley v. Kitson*.<sup>29</sup> Strictly speaking, if that decision is to constitute the true rule, no *plea* is ever proper save where it raises matters extraneous to or out of harmony with the allegations of the bill. It is true that there was a time when the statute of limitations, though apparent as a defense upon the face of the bill, must be set up by plea or answer, but such is no longer the law.<sup>30</sup>

It was also the law in England that the defense of the

<sup>28</sup> *Tilden v. Barber*, 227 Fed. 1010; *sed quære*.

<sup>29</sup> 120 U. S. 303.

<sup>30</sup> *Story's Equity Pleadings*, Sec. 760.

statute of frauds must be specially pleaded, and could not be taken by demurrer.<sup>31</sup> Other instances there may be, under the chancery practice, where it is or was permissible to employ a plea instead of a demurrer; and the use of the words "or plea" in the first half of the rule is probably out of abundant caution.

The plea proper (sometimes classified into pleas in abatement and pleas in bar) whose function it is to deny or avoid some essential allegation in the bill, or to set up some extraneous matter which shall constitute a concise defense to the action, deals with matters of fact. Under the second branch of the rule under consideration, such a plea is now compulsorily relegated to the answer, where it may be separately stated. The wide scope of these pleas may be gathered from an examination of Mitford's, Story's and Daniell's works on Equity Pleading.

As I understand the doctrine of *pleas* in chancery proceedings, they performed two functions: (1) They prevented discovery, and (2) they saved a lengthy and expensive trial of the whole cause. In modern times we have almost completely lost sight of the former object; and in our anxiety to apply executive methods to the trials of causes, and prevent anything that delays the exhibition of the whole controversy, we are apt to lose sight of the value of the latter. Where a defense heretofore presentable by plea in bar or in abatement is made in the answer, it is absolutely within the sound discretion of the court to give or not to give it the effect of a plea by separate hearing.<sup>32</sup>

If the defendant moves to dismiss the bill or any part thereof (for insufficiency *in point of law*, as above provided) the court may call up and dispose of the matter at its discretion;<sup>33</sup> or either party may set the motion down for hearing upon five days' notice.<sup>34</sup> The Court will decline to dismiss upon

<sup>31</sup> *Ibid.*; Sec. 762 and note.

<sup>32</sup> Cf. *Union Sulphur Co. v. Freeport Co.*, 234 Fed. 191; *Boyd v. R. R. Co.*, 220 Fed. 174.

<sup>33</sup> Rule 29.

<sup>34</sup> *Ibid.*; *Southwestern Surety Co. v. Wells*, 217 Fed. 294.

motion, wherever the matter seems close, difficult or intricate.<sup>35</sup>

§ 6. **One Answer to Raise All Defences—Jurisdiction of Person.**—The new rules contemplate, as it seems, but one answer. That answer may contain matters formerly raisable by demurrer, matters constituting in effect the substance of a plea in bar or in abatement, as well as the proper subject matter of a general answer. The obligation of a defendant who *answers*, under these rules, is to lay down all his propositions—whether of law or fact—at once.<sup>36</sup> In so far as the answer now sets up, by way of substitute for demurrer or plea, matters that object to the jurisdiction of the person, it would seem that they would not be waived by the simultaneous inclusion of other defenses going to the merits. The permission, or requirement, to set them all up in the same answer was certainly not intended to make any of them destructive of their associates.

Is it possible, then, under the new rules, to raise every objection, including all those to the jurisdiction of the person, by answer? It has been said that there was no such thing in chancery as a plea to the writ.<sup>37</sup> It may be, therefore, that when it is desired to attack the sufficiency of the subpoena, or the truth or sufficiency of the return, the attack should be made by motion, on special appearance, supported by affidavits or testimony where the facts relied on are not patent.

It is, however, laid down by several cases, that where the defect is not patent on the face of the writ or return, the proper course is to file a plea in abatement, and that a mo-

<sup>35</sup> *Ralston Steel Car Co. v. Car Co.*, 222 Fed. 590; *Wright v. Barnard*, 233 Fed. 329.

<sup>36</sup> *Boyd v. R. R. Co.*, 220 Fed. 174.

<sup>37</sup> *Gibson's Suit in Chancery*, 2nd Ed., Sec. 244; *Romaine v. Insurance Co.*, 28 Fed. 625.

tion is only proper where the defect is patent.<sup>38</sup> Assuming the doctrine of these latter cases to be correct, I hazard the statement that (at the least) answer would be an appropriate pleading in every such case, except where the insufficiency of writ or return is apparent, when the old motion should be resorted to. I predict that the courts will eventually hold the answer a proper repository for defenses even of this sort. I need not point out the wisdom of avoiding a general appearance, until these matters are better foreclosed by decision under the new rules.

§ 7. **Answer—Contents.**—There is no such thing in Federal equity practice as a general denial of the allegations of the bill, and the answer has lost its former capacity, when verified, to constitute proof for its proponent. No necessity now exists for verification.<sup>39</sup>

It must, in short and simple language, set out the defense to each claim, specifically admitting or denying each of the allegations made by the plaintiff, unless the defendant is without knowledge, in which case he should so state, and such statement will have the effect of a denial. Old clauses about reserving the benefit of manifold imperfections, etc., in the bill, should be left out.<sup>40</sup>

It would seem to be no longer proper (at least as against objection) in a patent case to plead a number of patents as anticipating novelty of invention, without setting out clearly the particular respects wherein they negative the novelty of the asserted patent.<sup>41</sup>

Averments in the bill (other than of value or amount of damage) not denied, are taken as confessed, except as against an infant, lunatic or other *non-compos*, not under guardianship. The answer may state, in the alternative, as many de-

<sup>38</sup> U. S. v. Bell Telephone Co., 29 Fed. 17; Scott v. Oil Co., 122 Fed. 835; Electric Vehicle Co. v. Craig, 157 Fed. 316; Cf. Earle v. Chesapeake, Etc., R. R. Co., 127 Fed. 234; Rubel v. Beaver Falls, Etc., Co., 22 Fed. 282.

<sup>39</sup> Pittsburgh Heater Co. v. Beler, 222 Fed. 1. c. 952.

<sup>40</sup> Pittsburgh Heater Co. v. Beler, 222 Fed. 1. c. 953.

<sup>41</sup> Coulston v. Steel Range Co., 221 Fed. 669.

fenses as the defendant desires to set up, there being no requirement of consistency.<sup>42</sup>

§ 8. **Counterclaims — Two Classes — Scope of.** — “The answer *must* state in short and simple form any *counterclaim arising out of the transaction which is the subject-matter of the suit*, and *may*, without crossbill, set out any set-off or counterclaim *against the plaintiff* which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and cross claims.”<sup>43</sup>

There are here indicated two classes of counterclaims: (1) One arising out of the transaction which is the subject matter of the suit, and (2) one not so arising. The requirement with respect to the first class is mandatory; such a counterclaim must be set up in the answer, unless it is to be abandoned.<sup>44</sup> It is said that the main purpose of the mandatory part of Rule 30 was to dispense with crossbills, by requiring everything previously done by crossbill to be thereafter done by answer only.<sup>45</sup> This would seem to mean that such matter as was formerly the subject of a proper crossbill is now, in effect, matter of defense; and, like any other defense, may be waived by failure to set it up.

The first class of counterclaims is intended, in the main, to correspond with the classical crossbill.<sup>46</sup> But a crossbill, of the classical kind, lay to settle not only conflicting claims between a defendant and a plaintiff, or between a defendant and the plaintiff and other defendants, but also between two or more defendants. It is certainly contemplated by Rule 31, that a counterclaim may affect the right of other defendants.<sup>47</sup>

<sup>42</sup> Rule 30.

<sup>43</sup> Rule 30.

<sup>44</sup> *Portland Pipe Co. v. Slick*, 222 Fed. 528; *Buffalo, Etc., Co. v. Van Cleef*, 217 Fed. 91; *Electric Boat Co. v. Lake, Etc., Co.*, 215 Fed. 377.

<sup>45</sup> *Electric Boat Co. v. Lake, Etc., Co.*, 215 Fed. 377.

<sup>46</sup> *Ibid.*

<sup>47</sup> Cf. *Portland Pipe Co. v. Slick*, 222 Fed. 528.

If, therefore, the counterclaim of the first class includes (as did the crossbill) rights between two defendants, growing out of the subject-matter of the suit, we must say that unless a defendant chooses to set up such rights as he may have against a co-defendant, he forever abandons them. This hardly seems intended; and if not intended, then a crossbill would still lie between two such defendants; in the absence of which, their rights against each other would not be concluded. If this is not true, then we should give to *transaction* a meaning narrower than the possible subject-matter of a proper crossbill.<sup>48</sup>

§ 9. **The Counterclaim of the Second Class.**—With respect to the counterclaim of the second class, there has been manifested a strong tendency to disregard the plain language of the rule, and to refuse countenance to the setting up of independent and unrelated matters.<sup>49</sup>

To limit the *option* given to a defendant to rely upon any set-off or counterclaim against the plaintiff, which might be the subject of an independent suit in equity against him, to such claims as *must*, under the first branch of the rule, be set up, is simply destroying the *option*. The option conferred is to set up matters that could not have been set up by a crossbill.<sup>50</sup>

It was plainly the intention to put the defendant upon an equality with the plaintiff, who, under the provisions of Rule 26, could join as many actions (cognizable in equity) as he pleased against a defendant.

This second class of counterclaims contains the significant qualification, “*against the plaintiff*,” which seems, *ex indus-*

<sup>48</sup> Cf. as to scope of old cross-bill, *Goodno v. Hotchkiss*, 230 Fed. 514.

<sup>49</sup> Cf. *Plauder, Etc., Co. v. Giles*, 212 Fed. 452; *Williams v. Kinsey*, 205 Fed. 375; *Adamson v. Shaler*, 208 Fed. 566; *Terry v. Sturtevant*, 204 Fed. 103.

<sup>50</sup> *Electric Boat Co. v. Lake, Etc., Co.*, 215 Fed. 377; Cf. *Vacuum Cleaner Co. v. Valve Co.*, 208 Fed. 419; *Marconi Co. v. National Co.*, 206 Fed. 295; *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91; *Goodno v. Hotchkiss*, 230 Fed. 514.



*tria*, to have been omitted from the first class. On its face, this might be given a restrictive interpretation, as meaning "the plaintiff alone;" i. e., of such a sort as that a several judgment thereon could have been recovered against the plaintiff, in an original action.

At any rate, I do not believe that third persons can be dragged in, to have their rights settled by virtue of a counterclaim of the second class.<sup>51</sup> Under the English practice, a counterclaim against the plaintiff and third parties would seem not to be admissible, unless it arises out of the transaction in suit. The statutory language is, however, not the same with ours. Under the classical crossbill, the rule more generally laid down is that new parties could not be introduced.<sup>51a</sup>

That a counterclaim of the second class should even involve other defendants (along with the plaintiff) seems to me contrary to good practice and outside the language used. Future decisions must settle the question.

§ 10. **Counterclaim of Second Class—Jurisdiction.** — A complainant, against whom a counterclaim of the second class is filed, cannot object on the ground that he could not have been sued, on such counterclaim, in an original action in that district. He waives that question impliedly by bringing his own action, with knowledge of the right of counterclaim.<sup>52</sup>

Where the subject-matter of such a counterclaim depends upon diversity of citizenship, and that is non-existent, it cannot be heard, because this would violate the laws regulating federal jurisdiction. If it were a counterclaim of the first class, that jurisdiction would be ancillary—indeed would be involved in the original action.<sup>53</sup> Of course, the independent cause of action so set up must be equitable.<sup>54</sup>

<sup>51</sup> Cf. *Williams v. Adler*, 227 Fed. 374; *U. S. v. Woods*, 223 Fed. 316.

<sup>51a</sup> *Shields v. Barrow*, 17 How. 130; *Bunel v. O'Day*, 125 Fed. l. c. 319; *U. S. v. Woods*, 223 Fed. 316.

<sup>52</sup> *U. S. Bolt Co. v. Kroncke*, 234 Fed. 868; s. c. 216 Fed. 186; *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91.

<sup>53</sup> *Electric Boat Co. v. Lake, Etc., Co.*, 215 Fed. 377.

<sup>54</sup> *Buffalo Specialty Co. v. Van Cleef*, 217 Fed. 91.

§ 11. **Reply — Answer to Counterclaim — Motion.** — No reply is necessary, unless (1) it be specially ordered by the Court or (2) the answer assert a set-off or counterclaim (presumably of either class). Any other new or affirmative matter is deemed to be denied by the plaintiff. If the answer includes a set-off or counterclaim, the party against whom it is asserted must reply within ten days after filing of the answer, unless longer time be allowed by court or judge.

In the event the counterclaim affects the rights of other defendants, they or their solicitors must be served with a copy within ten days from the filing thereof, and such defendants shall have ten days (apparently after such service) within which to reply. In default of reply, the counterclaim may be adjudged confessed as in default of an answer to the bill.<sup>55</sup>

If the answer sets up an affirmative defense, set-off or counterclaim, and the plaintiff or some other defendant affected deems it insufficient (in point of law), he may, upon five days' notice, or such notice as the Court allows, file a motion to strike it out. If the Court finds it insufficient, but amendable, the Court may either strike it out, or permit it to be amended upon just terms.<sup>56</sup>

§ 12. **Indefiniteness — Impertinence — Transfer to Law Side—Legal Incident.**—The Court may, on just terms, order a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading; and I assume the proper method would be by motion, in the nature of the code motion to make more definite and certain.<sup>57</sup> The Court may, further, on proper terms, either upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out of any bill, answer or other pleading.<sup>58</sup>

If a suit is commenced in equity, which belongs to the law

<sup>55</sup> Rule 31; cf. *Goodno v. Hotchkiss*, 230 Fed. 514.

<sup>56</sup> Rule 33.

<sup>57</sup> Rule 20; Cf. *Coulston v. Steel Range Co.*, 221 Fed. 669.

<sup>58</sup> Rule 21; *Crim v. Rice*, 232 Fed. 570; *Williams v. Pope*, 215 Fed. 1000.

## § 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

side of the Court, it is not to be dismissed, but transferred to the law side and there proceeded with, with such alterations in the pleadings, if any, as may be required.<sup>59</sup> The result of this is to destroy, in effect, the defense of adequate remedy at law; because, if sustained, there is no dismissal, but a mere transfer. A recent statute has gone further in the same direction.<sup>60</sup>

If a matter ordinarily determinable at law arises in a well-founded suit in equity, and as an incident thereof, the matter will be determined, according to the legal principles applicable, by the equity court, without recourse to the law side.<sup>61</sup> Where, however, the cause of action in equity has utterly failed, the Court will not retain (as it appears) the purely legal phase; but would transfer the cause to its proper side of the court.<sup>62</sup> The Court is not deprived of the discretionary right to refer to a jury a question of fact.<sup>63</sup> Whether there may be a transfer ordered from the law to the equity side, has been doubted.<sup>64</sup>

**§ 13. Amended and Supplemental Pleadings.** — Taking up the question of amended and supplemental pleadings, the bill may be amended as of course at any time before the defendant has filed his pleading; but if any copy of the bill has issued from the clerk's office, before such amendment, a copy of the amended bill must be furnished to the solicitor of record of each of the opposing parties, unless otherwise ordered by court or judge.<sup>65</sup> After pleading filed by any de-

<sup>59</sup> Rule 22.

<sup>60</sup> Cf. J. C., Sec. 274a; *Goldschmidt v. Primos Co.*, 225 Fed. 769; *Corsicana Bank v. Johnson*, 218 Fed. 822; *Collins v. Bradley*, 227 Fed. 199; *U. S. v. Utah Co.*, 208 Fed. 821.

<sup>61</sup> Rule 23; Cf. *Cubbins v. Commission*, 204 Fed. 299; *Wright v. Barnard*, 233 Fed. 329; *Bucyrus Co. v. McArthur*, 219 Fed. 266.

<sup>62</sup> *Linden, Etc., Co. v. Houstain*, 221 Fed. 178; Cf. J. C., Sec. 274a.

<sup>63</sup> *Vosburg Co. v. Watts*, 221 Fed. 402.

<sup>64</sup> *Waldo v. Wilson*, 231 Fed. 1. c. 656; J. C., Sec. 274a.

<sup>65</sup> Rule 28.

fendant, the bill can be amended only by consent, or upon leave granted by the court or judge.

The answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment of the bill in issue, when justice requires it.<sup>66</sup>

It is further provided that the Court may, in its discretion, at any time in furtherance of justice, and upon equitable terms, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading; and the Court must at every stage disregard errors or defects not affecting the substantial rights of the parties. This carries out the policy of the general federal statute of jeofails.<sup>67</sup>

The amendment of answers was formerly a matter of great strictness.<sup>68</sup> When the bill is amended after answer is filed, the defendant must file a new or supplemental answer within ten days, unless otherwise ordered; or he will be subject to the penalties of default, as if no answer at all had been filed, unless perhaps the amendments are purely formal and do not affect the merits of the cause.<sup>69</sup> If material facts have occurred since the former pleading, either party may, upon reasonable notice and leave of court or judge, file a supplemental pleading, setting them up; and the same is true where such facts existed at the time of the former pleading, but the party was ignorant of them.<sup>70</sup>

Contrary to frequent state practice, a supplemental bill is not ordinarily required to set forth any of the averments of the original bill, and the same is true of bills of revivor;<sup>71</sup> although it is no longer necessary to resort to the latter; for

<sup>66</sup> Rule 30.

<sup>67</sup> Rule 19.

<sup>68</sup> *Chapman v. Barney*, 129 U. S. 677; *Hardin v. Boyd*, 113 U. S. 756; *Smith v. Babcock*, 3 Sumner 583; *Ritchie v. McMullen*, 79 Fed. 522; *Story's Equity Pleadings*, Sec. 894, *et seq.*; *Encyc. Pl. & Pr.*, Vol. I, p. 459.

<sup>69</sup> Rule 32.

<sup>70</sup> Rule 34.

<sup>71</sup> Rule 35.

§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

express provision has been made, whereby, in case of the death of either party, the Court, on mere motion, may order the suit to be revived upon substitution of the proper parties.<sup>72</sup>

§ 14. **Trial—Exclusion of Evidence—Methods of Eliciting.**—As a general rule, a trial in equity resembles a trial at law before the Court. The testimony is usually taken orally in open court, and the admissibility of evidence is passed upon by the Court, with exceptions taken to adverse rulings. Upon exception to the *exclusion* of testimony, the Court must report so much, or make such a statement thereof, as will show clearly the character of the evidence, the form of the offer, the objection, the ruling, and the exception. No case is ever to be reversed for the erroneous exclusion, unless the appellate court is convinced that the error was materially prejudicial.<sup>73</sup>

There are, however, a number of methods whereby evidence may be elicited before the day of the trial, although it must be formally offered and introduced thereat. These methods are (1) discovery, (2) depositions, (3) affidavits. To these matters we accordingly turn our attention.

§ 15. **Discovery by Interrogatories.**—There is no longer any room for interrogatories annexed to the bill, nor any usual necessity for a bill of discovery by the defendant.

The plaintiff, at any time after filing his bill, and the defendant, at any time after filing his answer, may file interrogatories in writing for the discovery, by the opposite party or parties, of facts and documents material to the support or defense respectively of the cause; indicating, at the bottom, which of the interrogatories are to be answered by each party. Only one set of interrogatories can be propounded to the same party, by a particular adversary, unless otherwise ordered by the court or judge; and in no case, without special order,

<sup>72</sup> Rule 45; Cf. *Spring v. Webb*, 227 Fed. 481.

<sup>73</sup> Rule 46.

can interrogatories be filed later than twenty-one days after the cause is at issue.

In the event the party to be interrogated is a public or private corporation, the court or judge may order interrogatories to be addressed to and answered by any officers of such corporation.<sup>74</sup> Copies of the interrogatories, for the use of the parties to whom they are addressed, must in all cases be filed with the clerk and by him sent to their respective solicitors of record, or, if there be no such solicitor, to the last known address of such parties.

Within ten days after the service of the interrogatories, objections to any of them may be presented to the court or judge, upon notice to the other side; in which event no answer is required to be made to the interrogatories until the objections are passed upon. The ruling upon the objections must be made as soon as practicable, and no answer, of course, is required to such interrogatories as are disallowed.

If no objections are filed, full answers must be made to the several interrogatories in writing, sworn to and signed by the party or officer interrogated, and filed in the clerk's office within fifteen days after service, unless an enlargement of time be ordered.

The court or judge, upon motion and reasonable notice, will make all orders necessary to enforce answers to interrogatories or compel the production or inspection of material documents in the possession of either party. Any party failing or refusing to comply with such order is liable to attachment; and in addition, if the contumacious party be plaintiff, his bill may be dismissed, or if defendant, his answer stricken out with the same effect as if never filed.

By demand in writing, served ten days before the trial, either party may call upon the other to admit in writing the execution or genuineness of any material document, letter or other writing; and if such admissions be not made within five days after service, the costs of proving the document, letter or writing must be paid by the party failing or refusing

<sup>74</sup> Cf. *Union Sulphur Co. v. Freeport Co.*, 234 Fed. 194.

§ 16 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

to comply with the demand, unless upon the trial the Court finds such failure or refusal to have been reasonable.<sup>75</sup>

§ 16. **Interrogatories — Subject-Matter — Effect.** — The foregoing provisions constitute the substance of Order 31 of the English Equity Rules, after which our Rule 58 is modeled.<sup>76</sup> The English decisions are of value and importance, as fixing the meaning of an adopted statutory provision. Under the old practice, interrogatories were filed with and made part of the bill. If the defendant wanted discovery, he had to file a crossbill. The purpose of Rule 58 was to provide for a simple practice, equally open to either party, for interrogating the other, without making such interrogatories part of the pleadings.<sup>77</sup>

It would seem from the decisions that the *manner*, rather than the *scope*, of the old discovery had been changed. Thus it has been held that in a penal action interrogatories will not lie;<sup>78</sup> that mere fishing expeditions, to pry into adversary's case, will not be sanctioned;<sup>79</sup> that the right of interrogation extends only to *facts* or documents in the knowledge or possession of the other party, and does not require disclosures of *evidence*.<sup>80</sup>

It has been held that the right of discovery, afforded by interrogatories, does not extend beyond what is material to the party's *own* ground of action (or defense).<sup>81</sup> A waiver of answer to the bill under oath does not constitute a waiver of the right to require answers to interrogatories.<sup>82</sup>

<sup>75</sup> Rule 58.

<sup>76</sup> P. M. Co. v. Ajax Co., 216 Fed. 634.

<sup>77</sup> Luten v. Kemp, 221 Fed. 424.

<sup>78</sup> Speidel v. Barstow, 232 Fed. 617.

<sup>79</sup> Window Glass Co. v. Brookville, 229 Fed. 833.

<sup>80</sup> Day v. Mountain, Etc., Mill Co., 225 Fed. 622; Luten v. Camp, 221 Fed. 424; Blast Furnace Co. v. Worth, 221 Fed. 430; P. M. Co. v. Ajax Co., 216 Fed. 634.

<sup>81</sup> Day v. Mountain, Etc., Mill Co., 225 Fed. 622; Cf. Blast Furnace Co. v. Worth, 221 Fed. 430; Cf. also, Wolcott v. National, Etc., Co., 235 Fed. 224.

<sup>82</sup> Luten v. Kemp, 221 Fed. 424.

§ 17. **Depositions—Rules.**—The ordinary method of trial being oral, and before the court, we should expect to find that depositions could only be taken and used, when provided for by the federal statutes heretofore mentioned in connection with procedure at law; and that no additional rules were necessary to complete the statutory scheme in that regard. Nevertheless, we have two rules dealing with the subject. Rule 54 provides as follows:

“*After a cause is at issue*, depositions may be taken as provided by Secs. 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given to the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the Court, or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the Court or judge under all the circumstances shall order.”

In other words, although the statute relating to depositions *de bene esse* authorizes their taking “in any civil cause *depending*” (and it is *depending* from the suing out of process), the rule says in effect that they can only be taken after the joinder of issue. Inasmuch as Section 917 of the Revised Statutes provides that the rules should be consistent with the laws of the United States, the result would seem incorrect; nevertheless such was apparently the law under the old rules.<sup>83</sup> The latter part of the rule does not require the absolute rejection of a deposition taken without requisite notice, but affords alternative remedies to the party claiming injury therefrom.

It is further provided by Rule 47 as follows: “The Court, upon application of either party, *when allowed by statute, or for good and exceptional cause shown for departing from the general rule* (to be shown by affidavit) *may permit* the depositions of named witnesses (to be used before the Court or upon

<sup>83</sup> Cf. *Stevens v. M. K. & T. R. R. Co.*, 104 Fed. 934; *Flower v. McGinniss*, 112 Fed. 377. The old rule was drawn prior to the insertion of the qualifying clause in the statute; but this should make no difference. Cf. *Iowa, Etc., Co. v. Montgomery*, 227 Fed. 1004.



§ 18 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

a reference to a master), to be taken before an examiner, or other named officer, *upon the notice and terms specified in the order*. All depositions taken under a statute, or under any such order of the Court, shall be taken and filed as follows, *unless otherwise ordered by the court or judge for good cause shown*: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time of filing plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

The first sentence of this rule is mainly intended, as I suppose, to permit a portion or all of the evidence to be taken down in writing, before the actual hearing, even though the statutes for taking depositions did not apply. I do not understand the words, "*when allowed by statute*;" I cannot see why the Court should have to *permit* what was already allowed by statute.<sup>84</sup>

Whether or not the second clause of the statute, "*unless otherwise ordered by the court or judge*," means that the court has power, in exceptional instances, to permit the depositions to be taken *before* issue, may be questioned. It seems to me plain that the court would have that power, just as it could extend the time at the other end of the period. Unless this is true, there would be nothing in the New Rules corresponding to old Rule 70. It would appear that the latter clauses of Rule 47 are general, limiting the usual time within which depositions of any sort can be taken.

As supporting the validity of the limitation in Rule 54, it may be said that a cause is *depending* beyond the limit set for taking depositions *after* issue joined; and that if one limitation is bad, the other is equally so.<sup>85</sup>

§ 18. **Depositions—Method of Taking.**—Reasonable notice in all cases, fixed by the Court or officer, is required to be given to the opposite side of the time and place of examina-

<sup>84</sup> Cf. *Iowa, Etc., Co. v. Montgomery*, 227 Fed. 1004.

<sup>85</sup> Cf. *Victor, Etc., v. Sonora Co.*, 221 Fed. 676.

tion of witnesses, before *an examiner or like officer*,<sup>86</sup> and adequate provision is made to summon and compel the attendance and testimony of witnesses whose testimony may be taken out of court.<sup>87</sup>

All evidence offered before *an examiner or like officer*, together with any objections, shall be saved and returned into court. Depositions may be upon question and answer or in narrative form, and the witness is subject to cross and re-examination.<sup>88</sup>

Objections to evidence, before *an examiner or like officer*, are required to set forth the ground thereof in short form, and no transcript must contain argument or debate.

The officer taking the deposition has no power to decide upon the competency, relevancy or materiality of the questions, but notes the objections in the deposition. The testimony of each witness, after being reduced to writing, must be read over to or by him and signed in the presence of the officer. If the witness refuses to sign, the officer signs the deposition, stating upon the record the reasons, if any, given by the witness for such refusal. The Court has power to deal with the costs of immaterial testimony taken by deposition.<sup>89</sup>

The expense of taking a deposition must be advanced by the party calling the witness; and the deposition is deemed to be published, as soon as filed, unless otherwise ordered.<sup>90</sup>

§ 19. **Affidavits.**—Affidavits are a permissible means of adducing evidence upon the trial of cases involving the scope or validity of a patent or trade-mark. In such cases, “The District Court may, upon petition, order that the testimony in chief of *expert witnesses*, whose testimony is directed to matters of opinion, be set forth in affidavits, and filed as fol-

<sup>86</sup> Rule 53.

<sup>87</sup> Rule 52.

<sup>88</sup> Rule 49.

<sup>89</sup> Rule 51. It is hard to tell just how far some of these provisions are strictly limited to testimony taken before an *examiner* or like officer; e. g., the state (R. S. 864) requires signing by the witness.

<sup>90</sup> Rule 50.

§ 19 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

lows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the time for filing original affidavits."<sup>91</sup>

It is hardly likely that this rule will be very greatly resorted to, except for more or less formal proof, or where the facts are clear. An affidavit drawn by skillful counsel is not apt to convey an utterly unbiased impression; and it is further provided, that in the event the adverse party moves to require the production of the affiant for cross and re-examination before the Court upon the trial, the Court must so order, and if the order is not complied with, the affidavit can not be used as evidence.<sup>92</sup>

<sup>91</sup> Rule 48.

<sup>92</sup> *Ibid.*

## CHAPTER XII.

### EQUITY PROCEDURE—CONCLUDED.

- § 1. Setting Down for Trial—Continuance.
- 2. Master—Reference Unusual.
- 3. Proceedings Before Master—Report.
- 4. Exceptions to Report.
- 5. Decrees *Pro Confesso*—Setting Aside.
- 6. Right to Be Heard After Decree *Pro Confesso*.
- 7. Form of Decree—Performance—Clerical Errors.
- 8. Motion for Rehearing.
- 9. Bill of Review—Time for Refiling—Leave.
- 10. Injunctions—Who May Grant.
- 11. Restraining Orders—Preliminary Injunctions—Notice—Bond  
Continuation Pending Appeal.
- 12. *Ne Exeat*.
- 13. Affirmations—Computation of Time—Additional Rules.

§ 1. **Setting Down for Trial — Continuance.** — After the time for taking and filing depositions has elapsed, the case is put down upon the trial calendar. No depositions can thereafter be taken, except for strong reasons shown by affidavit, setting forth why the testimony cannot be had orally upon the trial, and why the deposition has not been earlier taken, together with the evidence expected from the witness.<sup>1</sup>

A continuance (that bane of expedition in legal proceedings) is by no means a matter of course. The case may be passed to another day of the *same term*, by order of Court or consent of counsel. It may be continued beyond the term, (1) in exceptional cases, by the Court upon good cause shown by affidavit, subject to such terms as the Court shall impose; (2) by a stipulation signed by the counsel for all parties, and the payment of all costs up to that time. In the latter event, (as I think, although the following may be construed as applicable to both 1 and 2),<sup>2</sup> the case is dropped from the trial cal-

<sup>1</sup> Rule 56.

<sup>2</sup> Cf. *Davis v. Power Co.*, 229 Fed. 633.

endar, subject to reinstatement and prompt hearing, upon application to the Court of either party. If not so reinstated within the year, the suit shall be dismissed without prejudice.<sup>3</sup>

§ 2. **Master—Reference Unusual.**—In this connection it will be necessary to advert to a very important aid of the Court—the Master in Chancery. “A Master in Chancery is an officer appointed by the Court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular instances, the auditing and ascertaining of liens upon property involved.”<sup>4</sup>

A court of equity might, with the consent of the parties, refer the whole case to a Master, in which event his findings were in the nature of an arbitration; and although not absolutely conclusive, were difficult to overthrow except for plain error in law.<sup>5</sup>

Upon an ordinary reference, without consent, his findings were merely advisory, but were usually accepted by the Court, unless exceptions were filed thereto, in which event the burden was upon the exceptor.<sup>6</sup>

The new rules provide for the appointment by the District Court of two sorts of Masters, namely: Standing Masters, whose tenure is indeterminate, and to whom matters are usually referred, and Special Masters, for particular cases, known as Masters *pro hac vice*. The compensation of both classes is fixed by the Court for whatever work they perform, and the allowance therefor is charged by the Court against the proper parties, who must pay it under penalty of attachment; but no Master can retain his report as security.<sup>7</sup>

<sup>3</sup> Rule 57.

<sup>4</sup> Kimberley v. Arms, 129 U. S. 512.

<sup>5</sup> Kimberley v. Arms, 129 U. S. 512; Davis v. Schwartz, 155 U. S. 637; U. S. Trust Co. v. Mercantile, Etc., Co., 88 Fed. 40.

<sup>6</sup> Kimberley v. Arms, 129 U. S. 512.

<sup>7</sup> Rule 68.

Under the new rules, a reference to a Master is to be unusual, save in matters of account; and is ordered only upon a showing that some exceptional condition requires it. When allowed, the party at whose instance or for whose benefit it is made, must present the order of reference to the Master within twenty days (unless longer time be allowed by the Court or judge) and if this be not punctually done, the adverse party may cause proceedings to be had before the Master at the cost of the party who procured the reference. As soon as the reference is brought before him the Master must speedily set the same for hearing, and give notice to each side. If, on the appointed setting, either party do not appear, the Master may proceed *ex parte* or adjourn to another day, giving notice to the absent side of such adjournment. If the Master manifests too leisurely a disposition, either party may move the Court or judge to enjoin diligence upon him and to require his report.<sup>8</sup>

**§ 3. Proceedings Before Master—Report.**—Ample powers are conferred upon the Master to examine the parties, upon oath, touching all matters embraced in the reference, as well as to hear witnesses *viva voce* or by deposition, and to require the production of all relevant books, papers and documents; and generally to direct and regulate the proceedings before him in accordance with law and justice.<sup>9</sup>

All affidavits, depositions and documents (in the cause) previously made, read or used in the court directing the reference, may be employed before the Master.<sup>10</sup>

In order to narrow the dispute, parties required to account before a Master must bring in their respective accounts in the form of debtor and creditor; and any of the parties, dissatisfied with an account so stated, may examine the accounting party *viva voce* or upon interrogatories, as the Master directs.<sup>11</sup> The accounting party is not required in the first instance to set

<sup>8</sup> Rules 59, 60; Cf. *Rollman v. Hardware Works*, 229 Fed. 579.

<sup>9</sup> Rule 62.

<sup>10</sup> Rule 64.

<sup>11</sup> Rule 63; Cf. *Beckwith v. Range Co.*, 207 Fed. 848.

out in his account the sources of the evidence to sustain each item.<sup>12</sup>

Where any creditor or other person asserting a claim to property or funds comes before the Master, the latter may examine him either *viva voce* or upon written interrogatories, or in both modes; and the evidence is to be taken by the Master or some other person thereto authorized by him; and in his presence, if either party so require.<sup>13</sup>

When he has concluded his hearings, the Master makes up his report. He should not set out, but should identify, documents used before him.<sup>14</sup>

The report being prepared and signed, he files it in the Clerk's office, who enters in his equity docket the day of its filing. Thereupon the parties have twenty days within which to file exceptions thereto; if no exceptions are filed, the report stands confirmed;<sup>15</sup> if filed, they stand for hearing before the Court, at its then session, or if it be not sitting, at the next session held thereafter, whether stated or adjourned.<sup>16</sup>

§ 4. **Exceptions to Report.**—Under the ancient chancery practice, no exceptions could be taken to a Master's report, which were not taken before the Master. The Master must have been given an opportunity to correct his own errors.<sup>17</sup>

Under that practice, "the master made a draft of his report, notified counsel of his proposed findings, gave them an opportunity to point out such errors, and the master considered and corrected them."<sup>18</sup>

Is this required under the new rules? The compilers seem to have left this matter as uncertain as it was under the older rules. Some authorities hold that the exceptions contemplated in the rules are to be filed in court, within the time allowed,

<sup>12</sup> *Cushman v. Grammes*, 234 Fed. 949.

<sup>13</sup> Rule 65.

<sup>14</sup> Rule 61.

<sup>15</sup> *In re Pearce*, 210 Fed. 389; *Decker v. Smith*, 225 Fed. 776.

<sup>16</sup> Rule 66.

<sup>17</sup> *Story v. Livingston*, 13 Pet. 1. c. 366.

<sup>18</sup> *Bliss v. Anaconda, Etc., Co.*, 156 Fed. 308.

and that the Master is under no duty to prepare a preliminary draft, for the inspection of the parties.<sup>19</sup>

Other cases in the lower federal courts hold, that *with respect to matters of fact*, no exceptions can be heard in court unless the objection was urged upon the Master below.<sup>20</sup>

The Supreme Court has never rejected exceptions on the ground that they were not filed before the Master; but it has never squarely passed upon the question, so far as I can discover.<sup>21</sup>

I have spoken to two gentlemen of considerable experience as Masters in this city, and they have never followed the practice of notifying counsel of their findings, before the report is filed. The Clerk, however, insists that it is usual and proper practice.<sup>22</sup>

On the other hand, it is the usual practice to make objections to the admission or rejection of testimony before the Master, and to save exceptions thereto; and upon every analogy it seems to me that this is necessary; if, indeed it is not expressly provided for.<sup>23</sup>

For every exception that is overruled, the exceptor must pay as costs to the opposite party the sum of five dollars; and for every one sustained, the exceptor is entitled to the same amount as costs from his opponent.<sup>24</sup>

Above everything, exceptions must be specific and not general. They are in the nature of special demurrers, and not

<sup>19</sup> Hatch v. Ry. Co., 9 Fed. 856; Jennings v. Dolan, 29 Fed. 861; Fidelity Co. v. Shenandoah Co., 42 Fed. 372; Cf. Home Land Co. v. McNamara, 111 Fed. 822.

<sup>20</sup> Gay Mfg. Co. v. Camp, 68 Fed. 67; 65 Fed. 794; Celluloid Co. v. Cellonite Co., 40 Fed. 476; Bliss v. Anaconda, Etc., Co., 156 Fed. 309; Gray v. Bldg. Ass'n, 125 Fed. 512; Gaines v. New Orleans, 1 Woods, 104.

<sup>21</sup> Cf. McMicken v. Perrin, 18 How. 507; Sheffield v. Gordon, 151 U. S. 285.

<sup>22</sup> Cf. A very helpful treatment of this subject in Henderson's Chancery Practice, Secs. 362, *et seq.*

<sup>23</sup> Cf. Rule 51; Rule 49; Troy Factory v. Corning, 6 Blatchf. 328; Rollman v. Hardware Co., 229 Fed. 579.

<sup>24</sup> Rule 67.



general denials to the conclusions of the Master. The Court, which has referred the matter for the sake of lightening its own labors, ought not to be compelled, by the generality of an exception, to rehear the whole case.<sup>25</sup>

§ 5. **Decrees Pro Confesso—Setting Aside.**—We have heretofore proceeded upon the assumption that issues were made up, and contested, within the periods prescribed. We have also seen that the defendant to whom the subpoena was addressed was warned to file his answer or other defense within twenty days after service. It is in pursuance of this motion, that rule 16 provides as follows: “It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the Court, to file his answer or other defense to the bill in the Clerk’s office within the time named in the subpoena as required by rule 12. In default thereof the plaintiff, may, at his election, take an order as of course that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*.”

This order that the decree be taken *pro confesso* is not final but interlocutory; but the Court may proceed to a final decree at any time after the expiration of thirty days from the entry of the order. During this thirty days or other period intervening, up to the time of final decree, the decree *pro confesso* is preliminary, and the Court may, on good cause shown, set aside the order and permit the defendant to plead.<sup>26</sup>

Under the general rule that all interlocutory orders remain in the breast of the Court until the final decree, I assume that the lapse of a term would make no difference.<sup>27</sup>

After the final decree *pro confesso* has been regularly entered, it is absolute and binding, unless a motion is made, during the term, supported by affidavit, showing cause why it

<sup>25</sup> Cf. *Sheffield v. Gordon*, 151 U. S. 285; *Sanford v. Embry*, 151 Fed. l. c. 983; *Columbus, Etc., Ry. Co. Appeals*, 109 Fed. 177.

<sup>26</sup> *Dean v. Mason*, 20 How. 198; *French v. Hay*, 22 Wall. 238; *U. S. v. Whitmire*, 188 Fed. 422; *McFarland v. Bank*, 129 Fed. 244.

<sup>27</sup> *Perkins v. Pourpignet*, 6 How. 206; *Wooster v. Handy*, 21 Fed. 51.

should be set aside; and no such motion can be granted except upon payment of all or a reasonable part of plaintiff's costs up to that time and an undertaking to file answer within such time as the Court directs, as well as to submit to such other terms as may be imposed.<sup>28</sup>

**§ 6. Right to be Heard After Decree Pro Confesso.**—The order for a decree *pro confesso* having been taken, its consequence remains to be considered. The allegations of the bill, in so far as they are distinct and positive, are taken as true, with the same force and dignity as if solemnly proven. If they are indefinite, or the demand of the plaintiff is in nature uncertain, as where an accounting is prayed or damages sought, the requisite certainty must be afforded by the plaintiff's proofs.<sup>29</sup>

It has been made a question how far, if at all, the defendant against whom an order of this sort has been taken, has a right to be heard in the subsequent proceedings. The rule says they shall be *ex parte*. This question was left undecided by Justice Bradley (a great master of equity pleading) in *Thomson v. Wooster*.<sup>30</sup>

Some cases hold that he has no standing in court, nor any right to be heard in any way.<sup>31</sup>

On the other hand, *where an appearance had been entered*, it was held that defendant was entitled to notice of application for decree.<sup>32</sup>

There are other provisions for decree *pro confesso* in the equity rules. Reference in this connection may be made to rule 29, where an overruled motion to dismiss must be followed by answer within five days, or a decree *pro confesso*

<sup>28</sup> Cf. Rule 17; *Austin v. Riley*, 55 Fed. 833; *Stuart v. St. Paul*, 63 Fed. 644; Cf. *Bronson v. Schulten*, 104 U. S. 415.

<sup>29</sup> Cf. Rule 30; *Thomson v. Wooster*, 114 U. S. 104; *Ohio R. R. Co. v. Central Trust Co.*, 133 U. S. 83; *Encycl. Pl. & Pr.*, Vol. 5, p. 993.

<sup>30</sup> 114 U. S. 104.

<sup>31</sup> Cf. *Frow v. de la Vega*, 15 Wall. 552; *Provident, Etc., Co. v. Camden Co.*, 177 Fed. l. c. 859; *Austin v. Riley*, 55 Fed. 833.

<sup>32</sup> *Southern Pac. Co. v. Temple*, 59 Fed. 17; *Davis v. Garrett*, 152 Fed. 723; *Bennett v. Hoefner*, 17 Blatchf. 341.

may be taken; to rule 31, where a decree *pro confesso* may be taken on failure to reply to a counterclaim; to rule 32, where an amended bill must be answered under like penalty; and to rule 58, where a defendant, who refuses to comply with orders for discovery, may have his answer stricken out, and a decree *pro confesso* taken against him.

**§ 7. Form of Decree—Performance—Clerical Errors.**—Under the present practice, a decree is simple in form. Neither the bill, answer or any pleading or part thereof, nor any other prior proceedings should be recited or stated. It begins after the short form of a common-law judgment: “This cause came on to be heard (or to be further heard) at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows: . . .”<sup>33</sup>

In order to do complete justice in one action, the Court may (upon proper prayer) decree that the defendant debtor pay any deficiency upon proceedings for the foreclosure of mortgages or the enforcement of liens, and direct execution to issue therefor.<sup>34</sup>

A decree for the payment of money is enforced by a writ of execution, similar to that used for a judgment in assumpsit.<sup>35</sup>

If the performance of a specific act is required, the decree fixes the time within which it must be done; and if not done, the plaintiff files his affidavit in the Clerk’s office, and the Clerk issues a writ of attachment against the delinquent party, upon which his body is seized and held, until he complies with the decree and pays all costs. If such party cannot be found, upon attachment, a writ of sequestration is issued against his property, and it is held to compel obedience to the decree. In cases where the act required can validly be performed by a substitute, the court or judge may appoint some other person to make the conveyance or perform such other act as required, in the stead and at the cost of the disobedient party.<sup>36</sup>

<sup>33</sup> Rule 71.

<sup>34</sup> Rule 10; *Seattle v. Trust Co.*, 79 Fed. 179.

<sup>35</sup> Cf. *Pease v. Rathbun, Etc., Co.*, 228 Fed. 273.

<sup>36</sup> Rule 8; Cf. *Falls v. Eastin*, 215 U. S. 1; *Byrne v. Jones*, 159 Fed. 321.

When a decree or order is made for the delivery of possession, its performance may be compelled by a writ of assistance to enforce compliance.<sup>37</sup>

Every order, justified by the Court's jurisdiction, against or in favor of a person not a party to the suit, may be enforced against or in favor of such person, by the same process as if he were a party;<sup>38</sup> and clerical or accidental mistakes in decrees or decretal orders, may be corrected at any time before the end of the term at which the final decree is rendered, upon mere petition, without the form or expense of a rehearing.<sup>39</sup>

§ 8. **Motion for Rehearing.**—There is no such thing as a motion for a new trial in chancery proceedings, but its place is filled by the petition for rehearing. The rules provide that "No rehearing shall be *granted* after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be *admitted* at any time before the end of the *next* term of court, *in the discretion of the Court.*"<sup>40</sup>

This language is a substantial repetition of the older rule. Under that older rule, the word *granted* was not interpreted strictly; but where the petition was *filed* during the term and *entertained* by the Court, then the suit and the petition were deemed to be prolonged into the succeeding terms until the petition was disposed of, although the decree had been entered in form.<sup>41</sup>

What amounts to *entertaining* such a petition? In *Phillips v. Ordway*,<sup>42</sup> a recognition of the petition by entry of its filing on the journal of the Court would seem to have been sufficient. In the *Aspen Mining Company* case, the Court seems

<sup>37</sup> Cf. Rule 9; *Root v. Woolworth*, 150 U. S. 401; *Gormley v. Clark*, 134 U. S. 338; *Terrell v. Allison*, 21 Wall. 289.

<sup>38</sup> Rule 11; Cf. *St. Louis, Etc., Co. v. Bellamy*, 211 Fed. 172.

<sup>39</sup> Rule 72.

<sup>40</sup> Rule 69; Cf. *Sheeler v. Alexander*, 211 Fed. 544.

<sup>41</sup> *Aspen Mining Co. v. Billings*, 150 U. S. 31.

<sup>42</sup> 101 U. S. 745.

to indicate that a denial, upon full consideration, of the petition, would be sufficient to show that it had been entertained in the first instance. So where the record shows the petition was filed and taken under advisement.<sup>43</sup>

Where no appeal lies, the rule says that the petition for rehearing may be *admitted* at any time before the end of the term next after the final decree. From the term *admitted*, I understand that the petition must be *filed* and *entertained* during such term, in the same manner and with the same consequences as in the other case.

Inasmuch as appeals now lie in practically all cases, the last provision is of small importance.

All petitions for rehearing must contain the special matter or cause upon which the petition is based, and any facts set forth (that are not apparent on the record), must be verified by affidavit. The signature of counsel is essential.<sup>44</sup>

§ 9. **Bill of Review—Time for Filing—Leave.**—It is a general rule that all proceedings remain, pending under the term at which they were taken, in the breast of the Court, and under its absolute control. After the term has passed, however, all final judgments and decrees regularly rendered thereat become irrevocable by the rendering Court, unless some step, by way of motion or otherwise, has been taken, during the term, to modify or annul them.<sup>45</sup> We have just noted an exception to this doctrine, whereby in certain cases a petition for rehearing may be (or might have been) filed at the succeeding term. Out of anxiety to avoid injustice, courts of equity have established another exception, to which the new rules make no reference, but which is still undoubtedly a part of the federal equity machinery. This is the *bill of review*. It is filed in the Court which has handed down the decree, and seeks to obtain a modification or reversal thereof, upon the ground of either (1) error of law apparent upon the face of

<sup>43</sup> *New Orleans v. Fisher*, 91 Fed. 574.

<sup>44</sup> Rule 69.

<sup>45</sup> *Bronson v. Schulten*, 104 U. S. 410.

the decree, or of the pleadings and proceedings upon which it is based, excluding any consideration of the *evidence*; or, (2) some new matter which has arisen after the decree; or (3), newly discovered evidence, of decisive materiality, and not procurable before the rendition of the decree by the exercise of reasonable diligence.<sup>46</sup>

There is some federal authority to the effect that fraud in the procuring of a decree is a proper basis for the maintenance of a bill of review;<sup>47</sup> but it is certain that such a bill is so far original, that it may be filed in any competent court.<sup>48</sup>

A bill of review, where based upon error apparent, must ordinarily be filed within such a time as would be allowed by statute to take an appeal from the effective decree;<sup>49</sup> but where based on matters of evidence, the limitation does not apply, and the bill must, under all circumstances, be filed within an equitably reasonable time.<sup>50</sup>

Where the decree has been affirmed, leave to file the bill of review must be obtained from the appellate court;<sup>51</sup> and it

<sup>46</sup> Bacon's Ordinances, 1; Story's Equity Pleadings, Secs. 404, *et seq.*; Kennedy v. Bank, 8 How. 1. c. 609; Scotten v. Littlefield, 235 U. S. 407; Hill v. Phelps, 101 Fed. 650; Acord v. Western, Etc., Co., 156 Fed. 989; 174 Fed. 1019; Camp v. Parker, 121 Fed. 195; Novelty, Etc., Co. v. Buser, 158 Fed. 83; Lafferty v. Acme, Etc., Co., 143 Fed. 321; Ward v. Ward, 149 Fed. 204.

<sup>47</sup> Terry v. Bank, 92 U. S. 454; Kimberly v. Arms, 40 Fed. 548; Taylor v. Easton, 180 Fed. 363.

<sup>48</sup> Dowaglac, Etc., Co. v. McSherry, 155 Fed. 524; Hendryx v. Perkins, 114 Fed. 801.

<sup>49</sup> Ensminger v. Powers, 108 U. S. 292; Ricker v. Powell, 100 U. S. 104; Rector v. Fitzgerald, 59 Fed. 808; Reed v. Stanley, 97 Fed. 521; Blythe v. Hinckley, 111 Fed. 827; Chamberlain v. Peoria, Etc., R. R. Co., 118 Fed. 32; Home R. R. Co. v. Lincoln, 162 Fed. 133; cf. Fraenkl v. Cerecedo, 216 U. S. 295.

<sup>50</sup> Ricker v. Powell, 100 U. S. 104; Camp v. Parker, 121 Fed. 195; Taylor v. Easton, 180 Fed. 363; Acord v. Western, Etc., Co., 156 Fed. 989; Kessinger v. Bradford, 123 Fed. 91.

<sup>51</sup> Southard v. Russell, 16 How. 570; U. S. v. Moorehead, 1 Black. 488; *In re Potts*, 166 U. S. 263; Kimberly v. Arms, 40 Fed. 548.

## § 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

would seem that after affirmance on appeal no bill of review, for error apparent, would lie at all.<sup>52</sup>

In any event, where the ground is *evidentiary*, leave must always be sought and obtained, before the bill can be filed.<sup>53</sup>

§ 10. **Injunctions—Who May Grant.**—The new rules contain explicit provisions for the preparation of the record on appeal (Rules 75, 76 and 77), but, under the plan we have undertaken, their consideration must be deferred until we reach the subject of Appeal and Error.

There still remain to be noticed the subjects of Injunction and *Ne Exeat*; as well as one or two minor and supplementary matters.

Taking up the subject of injunction, the Judicial Code has imposed several limitations upon the jurisdiction to which we have already adverted under the head of the Equity Jurisdiction. In addition thereto, Section 264 (which is a modification of Section 719 of the Revised Statutes) reads as follows:

“Writs of injunction may be granted by any Justice of the Supreme Court *in cases where they might be granted by the Supreme Court*; and by any judge of a district court in cases where they might be granted by such court. But no Justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the Circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the district judge of the district. In case of the absence from the district of the district judge, or of his disability, *any circuit judge of the circuit*, in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.”

<sup>52</sup> *Southard v. Russell*, 16 How. 570; *Kingsbury v. Buckner*, 134 U. S. 650; *Franklin Bank v. Taylor*, 53 Fed. 854.

<sup>53</sup> *Ricker v. Powell*, 100 U. S. 104; *Rubber Co. v. Goodyear*, 9 Wall. 805; *Camp v. Parker*, 121 Fed. 195; *Hopkins v. Hebard*, 194 Fed. 301; *Acord v. Western, Etc., Co.*, 156 Fed. 989; 174 Fed. 1019.

There are thus apparently three classes of judges who are empowered, under certain circumstances, to grant injunctions or restraining orders. The section is particularly unsatisfactory with respect to the power, in this regard, of the Supreme Court Justices.

If a Supreme Court Justice, *as such*, can only issue injunctions in cases where the Supreme Court itself might do so; then, the issuance of an injunction, being ordinarily the exercise of original jurisdiction, on the part of the Supreme Court must be very rare.<sup>54</sup>

Every Justice of the Supreme Court is, however, assigned and allotted to a circuit; and it is further provided that “the word *Judge*, when applied generally to any circuit shall be understood to include such Justice.”<sup>55</sup>

At any rate, if the power still exists in a Supreme Court Justice to issue injunctions in cases outside the jurisdiction of the Supreme Court, such power ought to depend upon his official capacity as a judge of the Circuit Court of Appeals; but it is difficult to tell exactly what Section 264 means.<sup>56</sup>

**§ 11. Restraining Orders—Preliminary Injunctions—Notice—Bond—Continuation Pending Appeal.**—The federal laws have classified injunctions into (a) temporary restraining orders; (b) preliminary injunctions; and (c) final injunctions.

No preliminary injunction can be issued without notice to the opposite party.<sup>57</sup>

No temporary restraining order can be granted, without notice of the application therefor to the opposite side, unless it be made to clearly appear, from specific facts, shown by affidavits or verified bill, that immediate and irreparable injury,

<sup>54</sup> Cf. 1 Stat. 334; *Wallace v. Loomis*, 98 U. S. 146; R. S. 719.

<sup>55</sup> J. C., Sec. 121.

<sup>56</sup> Cf. *Searles v. Jacksonville R. R. Co.*, 2 Woods 621; *U. S. v. Louisville Canal Co.*, 4 Dill. 601; *Horn v. Pere Marquette Co.*, 151 Fed. l. c. 639; note, however, the implication of Sec. 266 of the Judicial Code.

<sup>57</sup> Act of Oct. 15, 1914 (38 Stat. 737).



§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

loss or damage will result to the applicant before notice can be served and hearing had.<sup>58</sup>

Every such temporary restraining order must be endorsed with the date and hour of its issuance, must define the injury and state why irreparable, and why there was no notice, and be forthwith filed in the Clerk's office and entered of record. By its terms every such temporary restraining order (granted without notice) must expire within a fixed time not exceeding ten days; but the court or judge may extend the time for a like period, for good cause shown and entered upon record.

Where restraining order is granted without notice, the hearing upon the application for preliminary injunction must be set down at the earliest possible time (upon order to show cause) and take precedence over all save elder matter of the same character; and, upon such hearing the party obtaining the restraining order must proceed with his application, just as if no restraining order had issued, under penalty of dissolution. Upon two days' notice, the party ordered restrained may appear and move dissolution or modification and Court must hear such motion as speedily as possible.<sup>59</sup>

Except as provided for injunctions against violation of the anti-trust laws, no temporary restraining order or preliminary injunction can be granted without bond.<sup>60</sup>

It is further provided by statute, that every order of injunction or restraining order must set forth the reasons for issuing the same, shall be specific in its terms, describe in reasonable detail the act or acts to be restrained, and shall be binding only upon the parties, their officers, agents, servants, employees, and attorneys, or those in active concert or participation with them, and who shall have received actual notice of the same.<sup>61</sup>

<sup>58</sup> Rule 73; Act of Oct. 15, 1914 (38 Stat. 737); *Thullen v. Triumph Electric Co.*, 212 Fed. 143; *Cathey v. Norfolk, Etc., R. R. Co.*, 228 Fed. 26.

<sup>59</sup> Rule 73; Act of Oct. 15, 1914 (38 Stat. 737).

<sup>60</sup> Act of Oct. 15, 1914 (38 Stat. 737).

<sup>61</sup> *Ibid.*

Provision is made by Rule 74 whereby the trial judge who has rendered a decree granting or dissolving an injunction may, at the time of appeal therefrom, make an order suspending, modifying or restoring the injunction during the pendency of the appeal upon proper terms.

§ 12. **Ne Exeat.**—It is provided by Section 261 of the Judicial Code that “Writs of *Ne Exeat* may be granted by any Justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of *Ne Exeat* shall be granted unless a suit in equity is commenced and satisfactory proof is made to the judge or court granting the same that the defendant designs quickly to depart from the United States.”

Such a writ is in the nature of equitable bail as against an equitable debtor. The claim must be pecuniary, and certain or capable of being rendered certain. A general unliquidated demand, as for damages, will not support the issue of the writ.<sup>62</sup>

Such a writ has been granted, however, at the suit of a creditor for a fixed sum, to restrain an administratrix from removing from the jurisdiction, with the effects of the deceased, before settling her accounts.<sup>63</sup>

An interesting example of its application may be found in *Griswold v. Hazard*.<sup>64</sup>

Its use is comparatively rare, save where analogous proceedings are had in bankruptcy.<sup>65</sup>

§ 13. **Affirmations—Computation of Time—Additional Rules.**—Affirmation in lieu of oath is provided for by the new rules, to meet conscientious scruples against swearing;<sup>66</sup>

<sup>62</sup> *Graham v. Stucken*, 4 Blatchf. 50.

<sup>63</sup> *Patterson v. McLaughlin*, 1 Cranch. C. C. 352.

<sup>64</sup> 141 U. S. 260; Cf. *Shainwald v. Lewis*, 48 Fed. 492.

<sup>65</sup> Cf. *In re Lipke*, 98 Fed. 970; *In re Berkowitz*, 173 Fed. 1012.

<sup>66</sup> Rule 78.

**§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.**

and when any time prescribed by them expires on Sunday or a legal holiday, the day after is in time.<sup>67</sup>

The District Court has power, but only with the concurrence of a majority of the circuit judges for the circuit, to make further rules to regulate its practice in equity, provided they be not inconsistent with the rules established by the Supreme Court; and while this power has, for the most part, been sparingly exercised, nevertheless the local rules should be constantly kept in mind.<sup>68</sup>

<sup>67</sup> Rule 80.

<sup>68</sup> Rule 79.

## CHAPTER XIII.

### CRIMINAL LAW.

- § 1. Source of Power—No Common Law Crimes.
- 2. State and Federal Sovereignty Respecting Crime.
- 3. Territorial Offenses.
- 4. High Seas—Admiralty Jurisdiction—Forts and Public Buildings—Islands.
- 5. The Criminal Code.
- 6. Criminal Procedure—Common Law—State Laws.
- 7. Arrest Without Warrant—Who May Issue Warrant.
- 8. Arrests and Preliminary Examinations.
- 9. Bail—Commitment for Removal—Order of Removal—*Habeas Corpus*.
- 10. Indictment—Infamous Crimes.
- 11. Venue.
- 12. Grand Jury—Composition—Inquisitorial Function.
- 13. Charging the Offense—Bill of Particulars.
- 14. Defects of Form.
- 15. Information Must Be Supported, When.

§ 1. **Source of Power—No Common-Law Crimes.**—The United States has no powers save those expressly or impliedly delegated. The constitution contains the following express grants of power to punish crime: (1) To provide for the punishment of counterfeiting the securities and current coin of the United States; (2) to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, and (3) to declare the punishment of treason as defined in the Constitution. There are other provisions of plain implication.<sup>1</sup>

Back of all expression or implication there is a broader doctrine which would suffice to support the power, even in the absence of anything else. The very notion of *law* involves the idea of compulsive force—of a sanction. The power to

<sup>1</sup> Cf. Art. 1, Sec. 3; Art. 1, Sec. 8; 6th Amendment; U. S. v. Hall, 98 U. S. 343.

enact a law involves the power to make it effective—to enforce it; otherwise it would be a mere futile request to be flouted by contemptuous violators. The readiest and most usual way of enforcing a law is to impose a penal sanction—to make it a crime to disobey it. Wherever, therefore, the United States has the power to bring a law into being, it has the implied power to preserve and effectuate its existence, by punishing those that would break down and destroy the law.

From these considerations it would seem to follow that there can be no common-law offenses against the United States, but that every crime against its government must be denounced by statute;<sup>2</sup> and that the field of federal crimes is, within the discretion of Congress, potentially coextensive with the scope of national institutions.<sup>3</sup> It is understood, of course, that constitutional and statutory provisions are constantly interpreted in the light of the common law and especially where they employ its established terminology; and we have already adverted to the natural expectation that a court of law will follow, in its procedure, the general modes of action historically practiced by such courts.<sup>4</sup>

**§ 2. State and Federal Sovereignty Respecting Crime.**—Between different sovereignties crimes are generally regarded as local in their nature.<sup>5</sup> Where territory lies within the boundaries of a state, there can be no geographical test of jurisdiction as between state and federal government. There is a dual sovereignty, covering the same physical territory; within which national power rests upon an abstraction from the power of the state, so that the subject-matter is lifted out of the realm of the physical state into another world—

<sup>2</sup> U. S. v. Hudson, 7 Cranch. 32; U. S. v. Britton, 108 U. S. 199; U. S. v. Eaton, 144 U. S. 677; Manchester v. Massachusetts, 139 U. S. 240.

<sup>3</sup> Cf. U. S. v. Fox, 95 U. S. 670; Curley v. U. S., 130 Fed. 1.

<sup>4</sup> Cf. U. S. v. Smith, 5 Wheat. 153; Moore v. U. S., 91 U. S. 270; U. S. v. Patten, 187 Fed. 664.

<sup>5</sup> Huntington v. Attrill, 146 U. S. 657.

a sort of fourth dimension—where federal power alone has existence, so far as necessary to accomplish its purposes.<sup>6</sup>

It has been declared, in general terms, that the jurisdiction of each state is coextensive with its territory.<sup>7</sup> How far a state may project an extraterritorial sovereignty, as for example, over its ships upon the ocean, or against its subjects abroad, is an interesting question, into which we shall not attempt to go minutely.<sup>8</sup> On principle, a state should have all the extra-territorial authority of an independent nation, except so far as limited by the powers conferred upon the federal government.<sup>9</sup> This limitation is very serious. A state has no power to send or receive diplomatic representatives, to enter into compacts or treaties, or to make war; it cannot, of itself, acquire territory or extend its boundaries; its power is gravely limited by the commerce power and the grant of admiralty and maritime jurisdiction; and for most purposes it may be said that a state is not a member of the society of nations.

That the national government may exercise very wide powers beyond the territorial limits of the states is unquestioned. It has the power to make war, to enter into treaties, to acquire and govern territory, to define and punish felonies upon the high seas, to exercise a potentially exclusive admiralty and maritime jurisdiction—with respect to foreign affairs has most of the powers recognized by general international law as vesting in sovereign nations.

Its jurisdiction over places reserved from the newly-created state, lands purchased with the unconditional assent of the state legislature, over the District of Columbia, Alaska, Porto Rico and the Philippines is familiar to all. So is the extra-

<sup>6</sup> *Ableman v. Booth*, 21 How. 506; 1. c. 523; *Tarbell's Case*, 13 Wall. 397.

<sup>7</sup> *U. S. v. Bevans*, 3 Wheat. 336; *Manchester v. Massachusetts*, 139 U. S. 1. c. 263.

<sup>8</sup> Cf. *McDonald v. Mallory*, 77 N. Y. 547; *The Hamilton*, 207 U. S. 398; *State ex rel. v. Main*, 16 Wisc. 398.

<sup>9</sup> Cf. *Pennoyer v. Neff*, 95 U. S. 1. c. 722.

territorial jurisdiction exercised by consular and other courts in certain semi-barbarous countries.<sup>10</sup>

§ 3. **Territorial Offenses.**—It is laid down by Section 272 of the Criminal Code that the offenses specified in Chapter 11 thereof are punishable by the United States:

“First: When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States *and out of the jurisdiction of any particular state*; or when committed within the admiralty and maritime jurisdiction of the United States, *and out of the jurisdiction of any particular state*, on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory or District thereof.

“Second: When committed upon any vessel registered, licensed or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario or any of the waters connecting any of the said lakes, or upon the River St. Lawrence where the same constitutes the international boundary line.

“Third: When committed within or on any of the lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building.

“Fourth: On any island, rock or key, containing deposits of guano, which may at the discretion of the President be considered as appertaining to the United States.”

§ 4. **High Seas—Admiralty Jurisdiction—Forts and Public Buildings—Islands.**—By the term “high seas,” as used in the first clause of this statute, I understand to be meant

<sup>10</sup> Cf. R. S. 4083, *et seq.*

the open, unenclosed waters of the sea, as distinguished from ports, havens and waters within narrow headlands of the coast;<sup>11</sup> and it is not here qualified by the words "out of the jurisdiction of any particular state;"<sup>12</sup> so that the crimes specified may be punished by the United States, when committed upon the high seas, although their *situs* be within the marine league to which the state may (at the least) validly extend its boundaries.<sup>13</sup> The open waters of the Great Lakes may be deemed "high seas."<sup>14</sup>

The succeeding clause of the statute makes such offenses punishable when committed "on any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state."

Observing in the first place that "particular state" means one of the United States,<sup>15</sup> we lay down the rule that the criminal jurisdiction of the admiralty (like its jurisdiction over torts) is dependent upon locality.<sup>16</sup> With respect to civil causes this local jurisdiction has been greatly extended in modern times;<sup>17</sup> and it is a proper inference that the possible scope of the criminal jurisdiction has been correspondingly widened.

It may be asserted, with a very considerable degree of assurance, that the criminal jurisdiction of national courts of admiralty could be extended to all offenses over which a nation can exercise jurisdiction, consistently with the law of nations, and committed upon the high seas, or upon any navigable waters connected with and forming an inlet from the sea, or upon any navigable waters used or susceptible of being used as maritime highways of commerce between the states

<sup>11</sup> U. S. v. Rodgers, 150 U. S. 1. c. 255.

<sup>12</sup> U. S. v. Rodgers, 150 U. S. 249.

<sup>13</sup> *Ex parte O'Hare*, 179 Fed. 662; Cf. U. S. v. Newark, 173 Fed. 426.

<sup>14</sup> U. S. v. Rodgers, 150 U. S. 249.

<sup>15</sup> Wynne v. United States, 217 U. S. 234.

<sup>16</sup> U. S. v. Coombs, 12 Pet. 1. c. 76-78; *Atlantic Transport Co. v. Imbroke*, 234 U. S. 52; 1. c. 60.

<sup>17</sup> Cf. *Perry v. Haines*, 191 U. S. 17; *Rodgers v. U. S.*, 150 U. S. 249.



or with foreign nations.<sup>18</sup> Logically this involves, with respect to crimes, a potentially exclusive *power* of legislative regulation in the federal government, as will be hereafter noted in dealing with admiralty.

The second paragraph of the statute exercises a portion of this admiralty jurisdiction, in taking no account whether the vessel mentioned is within or without the territorial boundary of a state.

In giving the consent referred to in the third paragraph, the state may reserve more or less of its own jurisdiction, so long as it does not interfere with the exercise of national purposes.<sup>19</sup>

The fourth paragraph is commented on and explained in *Jones v. United States*.<sup>20</sup>

§ 5. **The Criminal Code.**—Most of the statutes defining and punishing crimes against the United States have been compiled into the “Criminal Code,” which became effective on the first day of January, 1910. A number of particular statutes, prior as well as subsequent, have not been included therein. This code is of extensive content, comprising more than a hundred pages of octavo print. It is divided into fifteen chapters, dealing respectively with (1) offenses against the existence of the government; (2) offenses against the neutrality of the government; (3) offenses against the elective franchise and civil rights; (4) offenses against the operations of the government; (5) offenses relating to official duties; (6) offenses against public justice; (7) offenses against the currency or coinage; (8) offenses against the postal service; (9) offenses against foreign and interstate commerce; (10) the slave trade and peonage; (11) offenses within the admiralty and maritime and territorial jurisdiction of the United States; (12) piracy and related offenses; (13) offenses against morality in a territory or district; (14) general provisions as

<sup>18</sup> Cf. *U. S. v. Wilson*, 3 Blatchf. l. c. 438.

<sup>19</sup> Cf. *Fort Leavenworth v. Lowe*, 114 U. S. 525; *Palmer v. Barrett*, 162 U. S. 399.

<sup>20</sup> 137 U. S. 202.

to meaning of terms, etc.; (15) elaborate provisions for repeals and the effect thereof. The whole is broken up into consecutively numbered sections.

It would be confusing and tedious beyond measure to attempt to paraphrase or condense the statutes relating to any number of these offenses; and, in such a matter, *melius est petere fontes*.

As a general rule, the mere fact that Congress has undertaken to punish a particular act within a state as a federal crime does not prohibit the state from denouncing such an act as a crime against itself.<sup>21</sup>

§ 6. **Criminal Procedure—Common Law—State Laws.**—Taking up the subject of criminal procedure, the first rule is that, except so far as expressly adopted, state laws have no operation in the federal courts; and we must look to federal statutes and the practice of courts of common law, as applied by federal decisions, to guide our exploration.<sup>22</sup> There is a peculiar statute, however, to which our attention may be directed, in this connection. It is provided by R. S. § 722 as follows:

“The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title ‘Civil Rights’ and of Title ‘Crimes’ for the protection of all persons in their *civil rights*, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and Statutes of the State wherein the court having jurisdiction of such civil or criminal cause is

<sup>21</sup> Cf. *Fox v. Ohio*, 5 How. 410; *U. S. v. Cruikshank*, 92 U. S. 542; *Crossley v. California*, 168 U. S. 640; *Cross v. North Carolina*, 132 U. S. 132.

<sup>22</sup> *Jones v. U. S.*, 162 Fed. 417; *Howard v. U. S.*, 75 Fed. 986; *Erwin v. U. S.*, 37 Fed. l. c. 488; *U. S. v. Nye*, 4 Fed. 888.

held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.”

It has been (erroneously) contended that this statute should be confined to the vindication of what are known as “Civil Rights.” Justice Clifford, who gives it an apparently broader meaning, says that it is “a mere jumble of federal law, common law, and state law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to nothing more than a direction to a judge sitting in a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence . . .”<sup>23</sup> It has been declared to have reference to the forms of process and remedy;<sup>24</sup> and its actual application has been almost negligible.<sup>25</sup>

**§ 7. Arrest Without Warrant—Who May Issue Warrant.**—The first step in a criminal prosecution is usually the apprehension of the offender. It is provided by Section 788 of the Revised Statutes as follows:

“The marshals and their deputies shall have, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.”

This statute is important with respect to the general right of a marshal or his deputy to arrest, without warrant, actual or supposed offenders against the laws of the United States.<sup>26</sup> A considerable number of special statutes justify arrests by

<sup>23</sup> *Tennessee v. Davis*, 100 U. S. 1. c. 299.

<sup>24</sup> *In re Stupp*, 12 Blatchf. 501.

<sup>25</sup> Cf. *U. S. v. Eagan*, 30 Fed. 608; *U. S. v. Wells*, 163 Fed. 1. c. 323; *U. S. v. Mitchell*, 136 Fed. 909.

<sup>26</sup> *Cunningham v. Neagle*, 135 U. S. 1; *John Bad Elk v. U. S.*, 177 U. S. 529; *Carico v. Wilmore*, 51 Fed. 196; *In re Acker*, 66 Fed. 290; *U. S. v. Fulhart*, 106 Fed. 911.

federal officers, without warrant, and regardless of state laws.<sup>27</sup>

The great majority of arrests for federal offenses, however, are made under warrants previously obtained. It is provided by Section 1014 of the Revised Statutes, in part, as follows:

“For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.”

It seems strange that duties so intimately connected with the punishment of crimes against the United States should be entrusted to state magistrates, or that they should have any power or authority in the premises at all; and it is undoubtedly true that in the present organization of the federal courts, recourse is in practice seldom had to their assistance. It must be said, however, that such functions are not, strictly speaking, the exercise of judicial power; and the cases hold that while state officers are not compelled to perform such administrative functions at the behest of the federal government, they may, at their election, validly exercise them, unless prohibited by state law.<sup>28</sup>

**§ 8. Arrests and Preliminary Examination.**—The warrant is nearly always issued by and the hearing held before a United States Commissioner, whose appointment is provided

<sup>27</sup> Cf. for example: R. S. 3059; 30 Stat. 1153; 28 Stat. 74; 28 Stat. 360; 29 Stat. 621; 20 Stat. 341; 35 Stat. 426; 34 Stat. 264; 34 Stat. 1218.

<sup>28</sup> Cf. *Prigg v. Commonwealth*, 16 Pet. 1. c. 630; *Robertson v. Baldwin*, 165 U. S. 275; *DelleMagne v. Moisan*, 197 U. S. 1. c. 174.

for by the act of May 28, 1896, as amended.<sup>29</sup> This officer succeeded to the powers and duties formerly vested in commissioners of the circuit court, mentioned in the statute.<sup>30</sup>

It was the general intention of Congress to conform arrests, preliminary examinations, bail and imprisonment, under federal charges, to the procedure of the particular state, no matter whether a state or federal magistrate should be acting in that regard.<sup>31</sup>

This general conformity is controlled by constitutional or express statutory requirement. Thus there must be a sworn complaint, based upon knowledge,<sup>32</sup> or a certified copy of evidence under oath;<sup>32a</sup> and there is no such thing as a John Doe warrant.<sup>33</sup>

The act of 1894<sup>34</sup> further requires that the prisoner be brought before the nearest official qualified to grant a hearing, regardless of whether he issued the warrant; provided at least that a certified copy of the complaint be attached (as required) to the warrant.<sup>35</sup>

The statute, and the practice thereunder, does not exclude the arrest of the defendant upon a *capias* issued upon an indictment or information duly returned or filed, where he is found in that particular district. In such a case, there is no right to a preliminary examination, no matter what the state law may be.<sup>36</sup>

**§ 9. Bail—Commitment for Removal—Order of Removal—Habeas Corpus.**—In the event the Commissioner, or other

<sup>29</sup> 29 Stat. 184; 31 Stat. 956.

<sup>30</sup> Cf. U. S. v. Allred, 155 U. S. 591.

<sup>31</sup> U. S. v. Sauer, 73 Fed. 671; *In re Dana*, 68 Fed. l. c. 893; U. S. v. Horton, 2 Dill. 94; U. S. v. Rundlett, 2 Curt. 41; U. S. v. Harden, 10 Fed. 802; U. S. v. Martin, 17 Fed. 150; U. S. v. Zarafontis, 150 Fed. 97.

<sup>32</sup> U. S. v. Tureaud, 20 Fed. 621.

<sup>32a</sup> U. S. v. Baumert, 179 Fed. 735.

<sup>33</sup> West v. Cabell, 153 U. S. 78.

<sup>34</sup> 28 Stat. 416.

<sup>35</sup> Pettit v. Walshe, 194 U. S. 205; U. S. v. Puleston, 106 Fed. 294.

<sup>36</sup> U. S. v. Kerr, 159 Fed. 185; Cf. U. S. v. Farrington, 5 Fed. 343.

magistrate conducting the hearing, is of the opinion that probable cause has been shown, he commits for trial or admits to bail. Bail may be taken by the commissioners (or other magistrate) in all cases where the offense is not capital;<sup>37</sup> but in capital cases, it may be allowed only by the Supreme Court or a justice thereof, or the Circuit Court of Appeals, or a judge thereof, or by a judge of the district court.<sup>38</sup>

It frequently happens that an offender against whom a prosecution has been begun is found in a district other than that of the crime. In such a case, he is usually arrested upon a warrant sworn out before a commissioner (or other proper magistrate) of the district where he is found, and a hearing had upon the question of probable cause. In the event he is held and gives bail, such bail is conditioned for his appearance before the court of the United States which has cognizance of the offense.<sup>38a</sup>

Even though an indictment has been found or information filed in the district of the crime, if the defendant be found in another district, the procedure just indicated is resorted to.<sup>39</sup> Where such a defendant is unable or declines to give bond, and "is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender . . . is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."<sup>40</sup>

This order of removal is not a magisterial, but a judicial act, and because it may involve distressing consequences, should not be summarily awarded without opportunity to the defendant to be heard.<sup>41</sup> The judge should determine whether any offense against the government is charged; whether there is probable cause under the evidence to suppose the defendant

<sup>37</sup> R. S., Sec. 1015.

<sup>38</sup> R. S., Sec. 1016.

<sup>38a</sup> R. S., Sec. 1014.

<sup>39</sup> *Gund Brewing Co. v. U. S.*, 204 Fed. l. c. 20.

<sup>40</sup> R. S., Sec. 1014.

<sup>41</sup> *Beavers v. Henkel*, 194 U. S. 73; l. c. 83; *Price v. McCarty*, 89 Fed 84; *In re Beshears*, 79 Fed. 70; *U. S. v. Brawner*, 7 Fed. 86.

guilty, and whether the court to which the removal is sought has jurisdiction of the case.<sup>42</sup> The existence of an indictment or information in the court to which the prisoner is to be removed is not a prerequisite to the order of removal;<sup>43</sup> but a valid indictment is *prima facie* evidence of probable cause,<sup>44</sup> although not conclusive.<sup>45</sup> It has been held that the action of the committing magistrate is to be regarded as *prima facie* evidence to support the order.<sup>46</sup>

The fullest discussion of the whole practice with respect to warrants of removal is contained in the case of *U. S. v. Yarborough*.<sup>47</sup> *Habeas corpus* is the constant resort of an unsuccessful defendant, committed for removal, or ordered removed. For examples, see:<sup>48</sup>

§ 10. **Indictment—Infamous Crimes.**—There are two methods of laying before the trial court the record basis of a criminal prosecution, namely (1) indictment, and (2) information; both being derived from the common law.

The Fifth Amendment provides that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . . .” Presentment is unusual, and, being followed by indictment, may be considered a form thereof.<sup>49</sup>

The question then is, what is an “otherwise infamous crime” within the meaning of this limitation? The true test

<sup>42</sup> *Tinsley v. Treat*, 205 U. S. 20; *Greene v. Henkel*, 183 U. S. 1. c. 261.

<sup>43</sup> *Greene v. Henkel*, 183 U. S. 249.

<sup>44</sup> *Beavers v. Henkel*, 194 U. S. 73; *Haas v. Henkel*, 216 U. S. 462.

<sup>45</sup> *Tinsley v. Treat*, 205 U. S. 20; *Price v. Henkel*, 216 U. S. 1. c. 491; *U. S. v. Campbell*, 179 Fed. 762.

<sup>46</sup> *Price v. McCarty*, 89 Fed. 84; *U. S. v. Brawner*, 7 Fed. 1. c. 88; *Cf. U. S. v. Lantry*, 30 Fed. 232.

<sup>47</sup> 122 Fed. 293.

<sup>48</sup> *Haas v. Henkel*, 216 U. S. 462; *Tinsley v. Treat*, 205 U. S. 20; *Hyde v. Shine*, 199 U. S. 62.

<sup>49</sup> *Hale v. Henkel*, 201 U. S. 1. c. 60.

is, whether or not the crime charged is one for which an infamous punishment *might* be imposed by the court.<sup>50</sup>

A crime punishable by imprisonment in a state penitentiary or state prison (whether with or without hard labor) is to be deemed *infamous*.<sup>51</sup> Whether imprisonment, for a short term, in a workhouse, at hard labor is infamous, *quaere*.<sup>52</sup>

The Criminal Code now provides that "all offenses which may be punished by death or imprisonment exceeding one year, shall be deemed felonies."<sup>53</sup> It is further provided that "where any person convicted . . . is sentenced to imprisonment for . . . longer than one year, the court . . . *may* order the same to be executed in any state jail or *penitentiary* . . . the use of which is allowed by the legislature of the state for that purpose."<sup>54</sup>

For practical purposes, this makes every felony, as above defined, an infamous crime; because the court *might* sentence for more than a year, and, in that event, *might* send the accused to a state penitentiary.<sup>55</sup>

§ 11. **Venue.**—The indictment or information must be returned or filed in the court having local jurisdiction of the offense charged, i. e., in the proper *venue*. The Constitution provides<sup>56</sup> that "the trial of crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as Congress may, by law, have directed."

It is further provided by the Sixth Amendment that the

<sup>50</sup> *Ex parte Wilson*, 114 U. S. 417.

<sup>51</sup> *Mackin v. U. S.*, 117 U. S. 348; *In re Claason*, 140 U. S. 200; *Fitzpatrick v. U. S.*, 178 U. S. 1. c. 307; *The Paquete Habana*, 175 U. S. 1. c. 682.

<sup>52</sup> Cf. *Wong Wing v. U. S.*, 163 U. S. 228; *Ex parte Wilson*, 114 U. S. 147.

<sup>53</sup> Sec. 335.

<sup>54</sup> R. S. 5541.

<sup>55</sup> Cf. *Ex parte Mills*, 135 U. S. 263.

<sup>56</sup> Art. 3, Sec. 2.



## § 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

“accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the state and district* wherein the crime shall have been committed, which district shall have been previously ascertained by law.” This provision, with respect to locality of trial, applies only to crimes committed within the limits of a state. A crime against the laws of the United States, committed outside the limits of a state is not local, but may be tried at such place as Congress may have directed.<sup>57</sup>

It has been further provided by statute that the trial of all offenses punishable by death shall be had in the county where the offense was committed, unless this would be productive of great inconvenience;<sup>58</sup> that the trial of all offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be either in the district where the offender is found, or into which he is first brought;<sup>59</sup> and that an offense begun in one judicial district and completed in another may be deemed, for the purposes of complaint, trial and punishment, to have been committed in either.<sup>60</sup>

Putting an end to old controversies, it is provided by the Criminal Code<sup>61</sup> that in all cases of murder or manslaughter, the crime shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered, or other means employed which caused the death, without regard to the place where the death occurred.

Where a district contains more than one division, the prosecution is had in the division wherein the crime was committed, unless the cause be transferred upon application.<sup>62</sup>

**§ 12. Grand Jury.—Composition.—Inquisitorial Function.**  
—An indictment may be defined as a formal written com-

<sup>57</sup> U. S. v. Dawson, 15 How. 467; Jones v. U. S., 137 U. S. 202.

<sup>58</sup> J. C., Sec. 40 (which statute is never observed in practice).

<sup>59</sup> J. C., Sec. 41.

<sup>60</sup> J. C., Sec. 42.

<sup>61</sup> Sec. 336.

<sup>62</sup> J. C., Sec. 53.

plaint returned into court, under its official oath, by a duly constituted inquisitorial body known as the grand jury; whereby a particular person or persons are charged with the commission of a crime, described therein. A grand jury must consist of not less than sixteen nor more than twenty-three persons,<sup>63</sup> and the concurrence of twelve is essential to indictment or presentment.<sup>64</sup> Grand jurors are publicly drawn from a box containing, at the time of the drawing, the names of not less than three hundred persons possessing the qualification of jurors in the highest state court.<sup>65</sup> Disqualification on account of race, color or previous condition of servitude is expressly forbidden.<sup>66</sup>

Writs of *venire facias* are made out summoning the twenty-three (or such other number as the Court may direct)<sup>67</sup> whose names are drawn.<sup>68</sup> If less than sixteen obey the summons to attend or challenges destroy the quorum, the Court may order others to be summoned.<sup>69</sup> The Court appoints the foreman, who is vested with power to administer oaths and affirmations to witnesses appearing before the grand jury.<sup>70</sup>

The grand jurors may be returned from such parts of the district as the Court may direct, in order to avoid expense, unjust burden, and secure impartiality.<sup>71</sup> Where the district consists of divisions, the Court may draw its grand jurors from the counties constituting the division in which the sitting is held.<sup>72</sup> The defendant has no right to insist that every portion of the whole district be represented; all he can claim

<sup>63</sup> J. C., Sec. 282.

<sup>64</sup> R. S., Sec. 1021.

<sup>65</sup> J. C., Secs. 275, 276.

<sup>66</sup> J. C., Sec. 278.

<sup>67</sup> U. S. v. Eagan, 30 Fed. 608; U. S. v. Breeding, 207 Fed. 645.

<sup>68</sup> J. C., Sec. 279.

<sup>69</sup> J. C., Sec. 282.

<sup>70</sup> J. C., Sec. 283.

<sup>71</sup> J. C., Sec. 277; see cases cited, *infra*.

<sup>72</sup> U. S. v. Stowell, 2 Curt. 153; U. S. v. Wan Lee, 44 Fed. 707; U. S. v. Agnew, 165 U. S. 36.

## § 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

as a constitutional right, at any rate, is that all the jurymen should reside within the district.<sup>73</sup>

Being impanelled and sworn, they are not confined to such matters as may be suggested by the District Attorney, but they may investigate any alleged crime, no matter how or by whom suggested, and, upon finding the evidence, may direct the preparation of the formal charge.<sup>74</sup> They may summon and examine witnesses, though no cause or specific charge be pending before them.<sup>75</sup>

§ 13. **Charging the Offense—Bill of Particulars.**—By the Sixth Amendment, the accused “shall enjoy the right . . . to be informed of the nature and cause of the accusation.” The most celebrated case dealing with this requirement is *U. S. v. Cruikshank*.<sup>76</sup>

The familiar rule is recognized that, where the offense is purely statutory, it is generally sufficient to charge in the substantial words of the statute;<sup>77</sup> provided the words of the statute “fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense.”<sup>78</sup>

The true test has been declared to be, not whether the indictment might have been made more certain, but “whether (1) it contains every element of the offense intended to be charged, and (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.”<sup>79</sup>

<sup>73</sup> *U. S. v. Wan Lee*, 44 Fed. 707; *U. S. v. Ayres*, 46 Fed. 651; Cf. *U. S. v. Peuschel*, 116 Fed. l. c. 646.

<sup>74</sup> *Hale v. Henkel*, 201 U. S. 43.

<sup>75</sup> *Wilson v. U. S.*, 221 U. S. 361.

<sup>76</sup> 92 U. S. 542.

<sup>77</sup> *Pounds v. U. S.*, 171 U. S. l. c. 38.

<sup>78</sup> *U. S. v. Carll*, 105 U. S. 611; Cf. *Evans v. U. S.*, 153 U. S. 584.

<sup>79</sup> *Cochran v. U. S.*, 157 U. S. 286. The figures are interpolated in the quotation. Cf. *Burton v. U. S.*, 202 U. S. l. c. 372; *Peters v. U. S.*, 94 Fed. 127.

As a matter of fact, many instances seem to involve mere judicial discretion. It is difficult, at best, under the common law system, to law down clear and sweeping propositions; and reference must be had in all cases, except the most apparent, to the precedents, many of which could have been decided either way.

Statutes are sometimes enacted to relax the extreme stringency of common law rules.<sup>80</sup>

A middle class of cases may exist, where the indictment is sufficient as against demurrer, but still leaves the defendant so uninformed as to some details of the charge, as to authorize the Court, upon the defendant's request, to compel the prosecution to furnish a bill of particulars.<sup>81</sup> Such a bill forms no part of the record.<sup>81a</sup> Let it be finally observed that the body of no indictment can be amended by the prosecuting officers, even by leave of court, because it is then no longer the act of the grand jury. The rule is different with respect to an information, which remains after amendment the product of its original creator.<sup>82</sup>

§ 14. **Defects of Form.**—Common-law requirements as to form are done away, to a very great extent, by Section 1025 of the Revised Statutes, reading as follows: "No indictment . . . shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The statute by its terms is limited to matters of *form*, as distinguished from matters of *substance*; and confers a somewhat roving commission upon the Court to differentiate between the two, and to determine when, if ever, the omission

<sup>80</sup> Cf. *U. S. v. Fitzpatrick*, 178 U. S. l. c. 310; R. S., Secs. 5396, 5397.

<sup>81</sup> *Kirby v. U. S.*, 174 U. S. l. c. 64; *Rosen v. U. S.*, 161 U. S. 29; *Rimmerman v. U. S.*, 186 Fed. 307; *U. S. v. Thompson*, 189 Fed. 838; *U. S. v. Bayand*, 16 Fed. 376; *U. S. v. Adams*, 119 Fed. 240.

<sup>81a</sup> *Dunlop v. U. S.*, 165 U. S. l. c. 491.

<sup>82</sup> *Ex parte Bain*, 121 U. S. 1; *U. S. v. Walsh*, 3 Woodb. & M. 341; Cf. *Bishop Crim. Proc.*, Secs. 714, 715.

§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

of due form shall be deemed prejudicial. Examples of its operation are, where the only defect in the indictment is that some element of the offense is stated loosely and without technical accuracy;<sup>83</sup> where the indictment is presented to the Court by the foreman of the grand jury alone;<sup>84</sup> where an indictment laid the perjury as committed "on the —— day" of a stated month;<sup>85</sup> where there was no caption showing the organization of the court, no recital of finding by concurrence of requisite number of grand jurors, and signature by assistant to District Attorney.<sup>86</sup>

§ 15. **Information—Must be Supported When.**—An *information*, by the Attorney-General, without the intervention of a grand jury, was never allowed at common law for any capital crime or any felony. In this country the constitutional text is "capital or otherwise infamous crime;" and while in the early history of the government informations were practically never employed, save in civil prosecutions for penalties and forfeitures, yet they are now frequently and usually employed in prosecutions for offenses not capital or infamous.<sup>87</sup>

The right to file an information has been declared not to be a prerogative of the prosecutor's office, but to be conditioned on leave granted by the Court.<sup>88</sup>

Where it constitutes the foundation of a warrant of arrest, it must be verified or supported by affidavits stating, upon knowledge, the facts justifying its filing.<sup>89</sup> Most of the general doctrines respecting the substance and method of indictments apply equally to informations.

<sup>83</sup> *Dunbar v. U. S.*, 156 U. S. 185.

<sup>84</sup> *Bruce v. U. S.*, 226 U. S. 1.

<sup>85</sup> *U. S. v. Howard*, 132 Fed. 325.

<sup>86</sup> *Caha v. U. S.*, 152 U. S. 211.

<sup>87</sup> *Ex parte Wilson*, 114 U. S. 417.

<sup>88</sup> *U. S. v. Smith*, 40 Fed. 755.

<sup>89</sup> *Weeks v. U. S.*, 216 Fed. 292; *U. S. v. Morgan*, 222 U. S. 1. c. 282; *U. S. v. Tureaud*, 20 Fed. 621; *U. S. v. Palite*, 35 Fed. 58; *Johnston v. U. S.*, 87 Fed. 187.

## CHAPTER XIV.

### CRIMINAL LAW—CONTINUED.

- § 1. Distinct Offenses Not to Be Included in Count—Exceptions.
- 2. Joinder of Counts—R. S. 1024.
- 3. Manner of Objection to Indictment—Defects in Grand Jury.
- 4. Duplicity—Misjoinder.
- 5. Motions to Quash—Demurrers—*Respondeat Ouster*.
- 6. Arraignment—Entering Plea.
- 7. Severance—Continuance—Assigning Counsel—Copy of Indictment—List of Jurors and Witnesses.
- 8. Jury Trial—"Serious" and "Petty" Offenses.
- 9. Jurors—Impanelling—Challenge.
- 10. Rights of Confrontation—Exceptions—Depositions for Defendant.
- 11. Rules of Evidence—Original States.
- 12. The Same—New States.
- 13. Self-Incrimination.
- 14. The Immunity Afforded by Statute.
- 15. Searches and Seizures.

§ 1. **Distinct Offenses Not to be Included in Count—Exceptions.**—Pursuant to that policy of singleness of issue which characterized early common law pleading, it is the general rule that separate and distinct offenses should not be charged in a single count of an indictment.<sup>1</sup> There are certain exceptions to the strict operation of this rule, namely: (1) Where the specific accusation includes a lesser offense; (2) where the offenses are in reality parts or stages of the same criminal transaction; (3) where the statute creating the offense has denounced several acts in the disjunctive.

The first exception is provided for by Section 1035 of the Revised Statutes, reading as follows: "In all criminal cases

<sup>1</sup> U. S. v. Nunnemacher, 7 Biss. 129; U. S. v. Sharp, 1 Pet. 1. c. 131; U. S. v. Peterson, 1 Woodb. & M. 305; U. S. v. Patty, 2 Fed. 664; U. S. v. Fero, 18 Fed. 901; U. S. v. Taylor, 108 Fed. 621; U. S. v. Smith, 152 Fed. 542; U. S. v. Martindale, 146 Fed. 280; U. S. v. Winslow, 195 Fed. 578; U. S. v. L. & N. Ry. Co., 165 Fed. 936; Crain v. U. S., 162 U. S. 1. c. 634.

§ 2 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense.’’<sup>2</sup>

The second exception may be illustrated by the case where the defendant, being an officer of the United States, was charged with being concerned in the solicitation of money, for political purposes, from divers storekeepers and gaugers; and Judge Taft held that there was “little, if any, authority to sustain the proposition that it is not competent to join crimes of the character described, committed by one single act or series of acts at the same time and place, in a single count.’’<sup>3</sup>

The third exception is where a statute enumerates several acts in the alternative, and affixes the same penalty for the doing of any; there all may be charged conjunctively in one count, provided they be not repugnant.<sup>4</sup>

§ 2. **Joinder of Counts—R. S. 1024.**—It has long been established practice to join a number of counts in the same indictment, either describing the same transaction under different aspects, or setting forth separate criminal acts; and, in legal theory, each count is to be regarded for most purposes as a separate indictment. The propriety of such a course is declared by Section 1024 of the Revised Statutes, reading as follows:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, *which may be properly joined*, instead of having several indictments the whole may be joined in one indictment in separate counts;

<sup>2</sup> Cf. *U. S. v. Hansee*, 79 Fed. 303; *Sparf v. U. S.*, 156 U. S. 51.

<sup>3</sup> *U. S. v. Scott*, 74 Fed. 213; Cf. *Endleman v. U. S.*, 86 Fed. 456; *Clark v. U. S.*, 211 Fed. 916; *U. S. v. Fero*, 18 Fed. 901.

<sup>4</sup> *Lehman v. U. S.*, 127 Fed. 41; Cf. *U. S. v. Crain*, 162 U. S. 625; *U. S. v. Thomas*, 69 Fed. 588; *U. S. v. Nunnemacher*, 7 Bliss. 129.

and if two or more indictments are found in such cases, the Court may order them to be consolidated.”

According to the Court of Appeals, the clause “which may be properly joined” does *not* mean that no offenses belonging to any of the classes specified can be joined, unless such joinder was authorized by the technical rules of the common law. It “simply vests in the trial court a sound discretion in deciding whether a fair and impartial trial would be prevented by a joinder, notwithstanding the same would be permitted by one or more of the clauses mentioned in the first part of the section.”<sup>5</sup>

The leading case in the Supreme Court is *U. S. v. Pointer*.<sup>6</sup> That was a case where the indictment charged in two counts distinct murders committed on the same day, in the same county and district, and by the same person. It will be observed that the offenses were of the same grade or class and subject to the same punishment. The Court declared that “the statute does not solve this question, but leaves the Court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is *consistent with the settled principles of criminal law*.” The conclusion is reached that the Court, under the statute, may allow such joinder in the exercise of judicial discretion; being bound, however, to deny it, and require election, whenever it appears that the accused will be unfairly embarrassed in the presentation of his defense. The joinder in that case was held proper.<sup>7</sup>

In another case an indictment for murder charged in two counts, the commission of one murder in two different ways. The Court said that whether or not election could be compelled was a matter purely within the discretion of the Court.<sup>8</sup>

In still another case it was attempted, under the statute, to consolidate (1) an indictment against A, B, C and D for assault to kill X; (2) an indictment against the same defend-

<sup>5</sup> *Dolan v. U. S.*, 133 Fed. 440.

<sup>6</sup> 151 U. S. 396.

<sup>7</sup> Cf. *Williams v. U. S.*, 168 U. S. 1. c. 390; *Gardes v. U. S.*, 87 Fed. 172; *U. S. v. Eastman*, 132 Fed. 551; *Chadwick v. U. S.*, 141 Fed. 225.

<sup>8</sup> *Pierce v. U. S.*, 160 U. S. 355.



ants for assault to kill Y; (3) an indictment against the same defendants for arson against the property of Z, and (4) an indictment against A, B and C for arson against the property of W. The dates of some of the offenses were different.

The Court said that it was clear that the statute did not authorize the consolidation of indictments in such a way that some defendants might be tried for one crime at the same time with other defendants charged with a different crime; adding the following statement: "And even if the defendants are all the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."<sup>9</sup> This language would seem to be qualified, however, by *Williams v. U. S.*<sup>9a</sup>

It is said to be the general rule that election between counts will not be compelled, when the several counts are substantially leveled at the same criminal transaction, and have been inserted in good faith for the purpose of meeting the evidence as it may transpire.<sup>10</sup>

**§ 3. Manner of Objection to Indictment—Defects in Grand Jury.**—There are several methods of objecting to the propriety or validity of an indictment. These methods are (1) Motion to Elect; (2) Motion to Quash; (3) Plea in Abatement; (4) Demurrer; (5) Motion in Arrest of Judgment.

There is another proceeding by way of objection, which antedates the finding of the indictment; and this is by challenge to the personnel of the grand jury.

In so far as objections to the constitution, qualifications and proceedings of the grand jury are concerned, a number of cases hold that such objections are properly made (under R. S. 722) in the fashion prescribed by state statute, in the absence of any federal regulation.<sup>11</sup> Where there is no state

<sup>9</sup> *McElroy v. U. S.*, 164 U. S. 76.

<sup>9a</sup> 168 U. S., l. c. 390.

<sup>10</sup> *Terry v. U. S.*, 120 Fed. 483; *McGregor v. U. S.*, 134 Fed. 187.

<sup>11</sup> *U. S. v. Wills*, 163 Fed. 313; *U. S. v. Mitchell*, 136 Fed. 896; *U. S. v. Clume*, 62 Fed. 798; *U. S. v. Eagan*, 30 Fed. 608; *sed quære*.

statute, or the local court deems its observance impracticable, I assume the common law must be resorted to. Where the irregularities or other objections complained of are not such as to render void all the proceedings taken in impanelling the grand jury, they may be waived; and are waived by acquiescence and inaction. Such objections, in order to be safe, should be taken at the earliest available opportunity.

Where a defendant, for example, is committed, or bound over, to await the action of a particular grand jury thereafter to be impanelled, it would be prudent to take advantage of any opportunity afforded by the practice of the Court to correct any known prejudice or irregularity, in the composition of the grand jury, by challenge; that being the earliest occasion offered by the law.<sup>12</sup>

In the event, however, the defendant was not aware that the charge against him would be presented, or where the defect or disqualification was not known to him, or for any other reason no opportunity was afforded for challenge, the defendant is necessarily remitted to some other remedy. In such case he should, at the earliest opportunity after discovering the defect, and in any event before plea in bar, raise such objections by plea in abatement or by motion to quash. Where the facts are contested the plea in abatement is technically more appropriate.<sup>13</sup>

It has apparently been held by a very great judge (Justice Gray), in effect, that objections aimed at by challenge may be made just as properly by plea in abatement or motion to quash, as by challenge, even though the defendant has been under recognizance.<sup>14</sup>

A motion to quash or a plea in abatement upon the ground

<sup>12</sup> Cf. *Agnew v. U. S.*, 165 U. S. 36; *U. S. v. Gale*, 109 U. S. 65; *Hillegass v. U. S.*, 183 Fed. 199; *Crowley v. U. S.*, 194 U. S. 461; see also *Carter v. Texas*, 177 U. S. 442.

<sup>13</sup> *Agnew v. U. S.*, 165 U. S. 36; *Crowley v. U. S.*, 194 U. S. 461; *U. S. v. Gale*, 109 U. S. 65; *Keizo v. Henry*, 211 U. S. 146; *Burchett v. U. S.* 194 Fed. 821.

<sup>14</sup> *U. S. v. Richardson*, 28 Fed. 61; *Keizo v. Henry*, 211 U. S. 1. c. 149; Cf. *Wolfson v. U. S.*, 101 Fed. 430.

of irregularity or disqualification in the make-up of the grand jury is no darling of the courts. It must be carefully and strictly framed, show the prejudice complained of, and be promptly filed. A delay of even a few days may be fatal.<sup>15</sup> Where irregularities in the procedure of the grand jury are complained of, the remedy is by motion to quash or plea in abatement; and great promptitude is the part of wisdom.<sup>16</sup>

§ 4. **Duplicity—Misjoinder.**—The indictment may be subject to complaint upon the ground that different offenses have been improperly joined in the same count, or that counts have been improperly united. The proper recourse for such a situation would appear to be a motion to require election.<sup>17</sup> A motion to quash seems likewise admissible.<sup>18</sup> In the *Pointer* case, counsel took both routes.<sup>19</sup>

Generally speaking, in cases where joinder is legally possible (i. e., where not contrary to settled legal principles) motions to elect or to quash are addressed to judicial discretion.<sup>20</sup> In most cases an objection for duplicity or misjoinder must be raised, at the latest, before verdict, and is not a ground reached by motion in arrest or writ of error.<sup>21</sup> It is said that duplicity or misjoinder cannot be reached by general de-

<sup>15</sup> *Agnew v. U. S.*, 165 U. S. 36; *Hyde v. U. S.*, 225 U. S. 1. c. 373; *Lowden v. U. S.*, 149 Fed. 673; *Wolfson v. U. S.*, 101 Fed. 430; *U. S. v. L. & N. R. R. Co.*, 177 Fed. 780; *U. S. v. Greene*, 113 Fed. 683.

<sup>16</sup> *U. S. v. Wells*, 163 Fed. 313; *U. S. v. Kilpatrick*, 16 Fed. 765; *U. S. v. Rosenthal*, 121 Fed. 862; *U. S. v. Heinze*, 177 Fed. 770; Cf. *Breese v. U. S.*, 226 U. S. 1.

<sup>17</sup> *U. S. v. Harmon*, 38 Fed. 827; *U. S. v. L. & N. R. R. Co.*, 165 Fed. 1. c. 941; *U. S. v. Dolan*, 133 Fed. 1. c. 446; *U. S. v. Bennett*, 17 Blatchf. 357; *Connors v. U. S.*, 158 U. S. 1. c. 411; *Wiborg v. U. S.*, 163 U. S. 1. c. 648.

<sup>18</sup> Cf. *U. S. v. Patty*, 2 Fed. 664; *U. S. v. Bennett*, 17 Blatchf. 357; *U. S. v. Dolan*, 133 Fed. 1. c. 446; *Pointer v. U. S.*, 151 U. S. 396.

<sup>19</sup> 151 U. S. 1. c. 398, 399.

<sup>20</sup> *Pointer v. U. S.*, 151 U. S. 396; *U. S. v. Bennett*, 17 Blatchf. 357; *McGregor v. U. S.*, 134 Fed. 187; *Rooney v. U. S.*, 203 Fed. 928.

<sup>21</sup> *Connors v. U. S.*, 158 U. S. 408; *U. S. v. Bayaud*, 16 Fed. 376; *Morgan v. U. S.*, 148 Fed. 189.

murrer,<sup>22</sup> and this is doubtless true, unless a single count should contain charges which could by no possibility coexist, and were repugnant and irreconcilable or, perhaps, where the several counts would be plainly incapable in any wise of joint trial.

Nevertheless, demurrers may be found in cases of duplicity,<sup>23</sup> and I think the special demurrer on that ground was recognized at common law.<sup>24</sup>

**§ 5. Motions to Quash—Demurrers—Respondeat Ouster.**—The general rule prevails that motions to quash are addressed to the sound discretion of the Court, so that the overruling of such motions is not necessarily or usually to be deemed reversible error. Under this rule, it is better to avoid reliance upon motions to quash alone, where the matter can be raised in another fashion, as by demurrer.<sup>25</sup> Of course, a motion to quash, raising questions of fact, no more proves itself than a plea in abatement, and evidence must be introduced.<sup>26</sup>

There are not many decisions dealing explicitly with the nature of demurrers in criminal causes. The rule must be, as at common law, that a demurrer reaches the record, and the record alone; although to save useless expense, the Court has sometimes considered the bill of particulars.<sup>27</sup>

Demurrers have been said to be unusual in federal practice, because reliance is usually put upon a motion in arrest of judgment;<sup>28</sup> but so far as our local practice is concerned, this statement is absolutely untrue, and in matters not plainly bad as of substance, I should fear the curative effects of the trial and verdict.<sup>29</sup>

<sup>22</sup> Pooler v. U. S., 127 Fed. l. c. 515.

<sup>23</sup> U. S. v. Cadwallader, 59 Fed. 677.

<sup>24</sup> Cf., however, U. S. v. French, 57 Fed. 382.

<sup>25</sup> Logan v. U. S., 144 U. S. 263; Durland v. U. S., 161 U. S. 306; Hillegass v. U. S., 183 Fed. 199.

<sup>26</sup> Carter v. Texas, 177 U. S. 442.

<sup>27</sup> U. S. v. Adams Express Co., 119 Fed. 240.

<sup>28</sup> U. S. v. Kilpatrick, 16 Fed. l. c. 773.

<sup>29</sup> Cf. Dunbar v. U. S., 156 U. S. 185; Clement v. U. S., 149 Fed. 305.

It is laid down that the defense of the statute of limitations cannot be properly raised by demurrer. The remedy in such a case is by special plea in abatement or by evidence under the general issue.<sup>30</sup> By Section 1026 of the Revised Statutes, judgment against a demurrant is not final, but respondeat ouster; although it has been held that pleading overwaives the right to object to the overruling of the demurrer.<sup>31</sup> I assume the rule to be that, in federal criminal practice, a dilatory plea is waived and overruled by a plea in bar.<sup>32</sup> I further understand the rule to prevail, that (inasmuch as a demurrer is an assertion that the defendant cannot be required to plead) no demurrer can be filed while any plea is pending. The court has power, within its discretion, to permit the withdrawal of a plea and the filing of a demurrer.<sup>33</sup>

§ 6. **Arraignment—Entering Plea.**—An arraignment is a calling of the defendant to the bar of the court to formally apprise him of the charge and to demand his plea thereto. It was formerly supposed to be essential to due process of law that the record show arraignment.<sup>34</sup> Inasmuch as the arraignment is a mere formal opportunity to plead, it would seem to be waivable, either expressly or by implication.<sup>35</sup> Until some sort of plea, there is no issue to be tried; and the record is still required to show an actual plea, entered by the defendant or by the court for him.<sup>36</sup> In the event the defendant stands mute at his arraignment and declines to plead, it

<sup>30</sup> U. S. v. Cook, 17 Wall. 168; Greene v. U. S., 154 Fed. 401; Cf. U. S. v. Brace, 143 Fed. 703.

<sup>31</sup> Cf. Hillegass v. U. S., 183 Fed. 199.

<sup>32</sup> Cf. U. S. v. Gale, 109 U. S. 65.

<sup>33</sup> Phillips v. U. S., 201 Fed. l. c. 262; Cf. Post v. U. S., 161 U. S. 583.

<sup>34</sup> Crain v. U. S., 162 U. S. 625.

<sup>35</sup> Garland v. Washington, 232 U. S. l. c. 646; U. S. v. Malloy, 31 Fed. 19; Virginia v. Felts, 133 Fed. l. c. 92; Cf. Shelp v. U. S., 81 Fed. l. c. 701.

<sup>36</sup> Crain v. U. S., 162 U. S. 625; Shelp v. U. S., 81 Fed. l. c. 701; Cf. Garland v. U. S., 232 U. S. 642.

is the duty of the Court to enter a plea of not guilty, whereupon the cause is deemed at issue.<sup>37</sup>

**§ 7. Severance—Continuance—Assigning Counsel—Copy of Indictment—List of Jurors and Witnesses.**—If several have been jointly indicted or informed against, any of them may move for a separate trial (or severance, as it is called); the allowance or refusal of which is in the sound discretion of the Court.<sup>38</sup> If a continuance is sought, the ruling of the Court thereon is also a matter of discretion, not reviewable save in extreme cases.<sup>39</sup>

There is a popular notion to the effect that the Sixth Amendment requires the Court to assign counsel to defendants who request it. The provision really was intended to abolish the barbarous rule of the common law, which denied to a defendant the right to be represented by counsel in cases of felony.<sup>40</sup>

It is provided, however, by Section 1034 of the Revised Statutes, that “every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.”

It is further the invariable habit of the courts to assign suitable members of the bar as counsel for all indigent defendants; and, save under unusual circumstances of hardship, it is the moral duty of every lawyer, as an officer of the court and a minister of justice, to accept such assignment.

Out of tenderness for human life, the statute<sup>41</sup> requires “a

<sup>37</sup> R. S., Sec. 1032; *In re Smith*, 13 Fed. 25.

<sup>38</sup> U. S. v. Marchant, 12 Wheat. 480; *Ball v. U. S.*, 163 U. S. 662; *Cochran v. U. S.*, 147 Fed. l. c. 207; *Heike v. U. S.*, 192 Fed. 83.

<sup>39</sup> *Isaacs v. U. S.*, 159 U. S. 487; *Crempton v. U. S.*, 138 U. S. 361; *Goldsby v. U. S.*, 160 U. S. 70; *Clement v. U. S.*, 149 Fed. 305.

<sup>40</sup> Cf. *Reid v. U. S.*, 12 How. l. c. 364.

<sup>41</sup> R. S., Sec. 1033.

copy of the indictment and a list of the jury and of the witnesses to be produced on the trial *for proving the indictment*, stating the place of abode of each juror and witness," to be delivered to a defendant charged with *treason*, at least three days, or if charged with any *other capital offense*, at least two days before the trial. The words "for proving the indictment" exclude witnesses to be used merely in rebuttal,<sup>42</sup> and if new jurymen are necessarily called to complete the panel, it has been held no error to fail to furnish their names in advance.<sup>43</sup>

The benefits of this section may be waived by the defendant, but if proper and timely objection be made, their disallowance will be reversible error.<sup>44</sup>

Upon the principle of *expressio unius, exclusio alterius*, the provisions made by the section are not applicable to cases not capital. Thus, in cases not herein provided for, a defendant is not entitled as of right to be furnished with a copy of the indictment, although the court may doubtless direct such furnishing in a proper case.<sup>45</sup> Doubtless the Court might likewise, in its discretion, in a case outside this section, require the government to furnish a list of witnesses; but such an application is usually refused. No defendant has a right to be furnished the list of witnesses who testified before the grand jury.<sup>46</sup>

§ 8. **Jury Trial—"Serious" and "Petty" Offenses.**—The Sixth Amendment declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ;" and the third clause of Section 2 of Article 3 of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury."

<sup>42</sup> *Goldsby v. U. S.*, 160 U. S. 70.

<sup>43</sup> *Stewart v. U. S.*, 211 Fed. 41.

<sup>44</sup> *Logan v. U. S.*, 144 U. S. 263.

<sup>45</sup> *U. S. v. Van Duzee*, 140 U. S. 169; *Balliet v. U. S.*, 129 Fed. 689.

<sup>46</sup> *Wilson v. U. S.*, 221 U. S. 1. c. 375.

In interpreting these provisions, the Supreme Court has undertaken to differentiate between "serious" and "petty" offenses; holding that in the case of the former, the defendant can *only* be tried by a jury, while in the latter the jury may be validly waived and the cause tried by the judge.<sup>47</sup> In the case just cited the offense was a misdemeanor, punishable by a fine of fifty dollars, and the waiver was sustained. In *Callan v. Wilson*,<sup>48</sup> the defendant was convicted in a police court of the District of Columbia (which had no jury) of the offense of conspiracy. He brought *habeas corpus* and was discharged. Among other things, the Court said:

"*Except in that class or grade of offenses, called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution . . . secures to him the right to enjoy that mode of trial . . . in whatever court he is put on trial for the offense charged.*" The consequence would be that the right to demand a jury on appeal would be immaterial. The language clearly permits waiver in the excepted cases; indeed, implies the power of Congress in such cases to do away with jury trial.

It was held in *U. S. v. Praeger*,<sup>49</sup> that a jury might be validly waived where the defendant was charged with wilful refusal to testify before a court-martial, an offense punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months. As a matter of fact, the distinction between *serious* and *petty* offenses—*crimes* and mere misdemeanors—seems hazy.<sup>50</sup> It would seem safe to say that no waiver could validly be made in any case of felony.<sup>51</sup>

**§ 9. Jurors—Impanelling — Challenge.** — The statutory provisions for impanelling jurors and the issuance and return

<sup>47</sup> *Schick v. U. S.*, 195 U. S. 65.

<sup>48</sup> 127 U. S. 540.

<sup>49</sup> 149 Fed. 474.

<sup>50</sup> *Low v. U. S.*, 169 Fed. 86; *Frank v. U. S.*, 192 Fed. 864.

<sup>51</sup> *Windsor v. McVeigh*, 93 U. S. 274; Cf. *Ex parte Belt*, 159 U. S. 95.



of the venire have been heretofore referred to in the lecture on Procedure at Law.<sup>52</sup> Jurors have the same qualifications and rights of exemption as in the highest state courts.<sup>53</sup> As in the case of grand jurors, the Court may direct petit jurors to be returned from such parts of the district as will secure impartiality and avoid expense.<sup>54</sup> It is usual, where a district has been divided by statute into *divisions* to order jurors to be drawn only from the particular division in which the session is had; but by the weight of authority, the Court is not bound to do so.<sup>55</sup>

The right to challenge jurors for cause or favor comes from the common law, with the trial by jury itself, of which it is, generally speaking, an essential part.<sup>56</sup> Apart from Section 275 of the Judicial Code, above referred to, there is no statutory regulation of the grounds of challenge, which is of general application. It has been said to be quite customary in the federal courts to follow in this regard the state practice; although no method should be adopted which would seriously abridge the right existing at common law.<sup>57</sup> The mode of designating and impaneling jurors is, however, wholly in the control of the federal courts, and state laws are not applicable, save so far as adopted by rule or order.<sup>58</sup>

There is a statute providing that in prosecutions for bigamy, polygamy or unlawful cohabitation, the sympathy of a juror with the prohibited practices, or his having been guilty thereof, constitute good cause for challenge.<sup>59</sup> The Court tries all challenges for cause or favor.<sup>60</sup>

<sup>52</sup> Cf. J. C., 276, 279, 280.

<sup>53</sup> J. C., Sec. 275.

<sup>54</sup> J. C., Sec. 277.

<sup>55</sup> U. S. v. Penschel, 116 Fed. 642; U. S. v. Ayres, 46 Fed. 651; U. S. v. Greene, 113 Fed. 683; Spencer v. U. S., 169 Fed. 562; U. S. v. Merchants, Etc., Co., 187 Fed. 355; but Cf. May v. U. S., 199 Fed. l. c. 59; U. S. v. Chairis, 40 Fed. 820; U. S. v. Wan Lee, 44 Fed. 707.

<sup>56</sup> Lewis v. U. S., 146 U. S. 370.

<sup>57</sup> Lewis v. U. S., 146 U. S. 370.

<sup>58</sup> Pointer v. U. S., 151 U. S. l. c. 407; Radford v. U. S., 129 Fed. 49.

<sup>59</sup> J. C., Sec. 288.

<sup>60</sup> J. C., Sec. 287.

Where the offense charged is treason or other capital charge, the government is entitled by statute to six and the defendant to twenty peremptory challenges. In other cases of felony the government is given six and the defendant ten. In prosecutions for lesser offenses, each side may peremptorily challenge three. No account is taken of the number of charges nor of the number of defendants.<sup>61</sup>

**§ 10. Right of Confrontation—Exceptions—Depositions for Defendant.**—Coming now to the evidence, the Sixth Amendment confers upon the defendant the right to be confronted with the witnesses against him. The principal purpose of this provision was to prevent the use of depositions or *ex parte* affidavits; and to give opportunity for personal inspection and cross-examination of the government's witnesses before the trial jury.<sup>62</sup>

There are, nevertheless, certain exceptions to the strict and literal operation of this clause. In the first place, it has never been supposed to prevent the admission of dying declarations, where admissible under the doctrines established by the common law.<sup>63</sup>

In the second place, the testimony of a witness examined (and subject to cross-examination) upon a preliminary hearing or upon a former trial, is admissible: (1) Where the witness is dead;<sup>64</sup> (2) where the witness is absent from the jurisdiction by the connivance and procurement of the defendant;<sup>65</sup> (3) perhaps where the witness is insane, or too ill ever to be expected to attend the trial.<sup>66</sup>

The mere fact that the witness is beyond the reach of pro-

<sup>61</sup> J. C., Sec. 287.

<sup>62</sup> *Mattox v. U. S.*, 156 U. S. l. c. 242.

<sup>63</sup> *Kirby v. U. S.*, 174 U. S. l. c. 61; *Carver v. U. S.*, 164 U. S. 694; *Mattox v. U. S.*, 156 U. S. l. c. 243.

<sup>64</sup> *West v. Louisiana*, 194 U. S. l. c. 262; *Mattox v. U. S.*, 156 U. S. 237; *U. S. v. Greene*, 146 Fed. 796.

<sup>65</sup> *Reynolds v. U. S.*, 98 U. S. 145; Cf. *Motes v. U. S.*, 178 U. S. l. c. 470, *et seq.*; *West v. Louisiana*, 194 U. S. l. c. 262.

<sup>66</sup> *West v. Louisiana*, 194 U. S. l. c. 262; but see *Motes v. U. S.*, 178 U. S. l. c. 472, *et seq.*

cess would appear to be insufficient to justify the reading of his former testimony;<sup>67</sup> and the record of conviction of a thief or embezzler is not competent against the receiver.<sup>68</sup>

There is no provision giving the government the right to be confronted with witnesses; and some cases hold that the defendant may take depositions under a *dedimus*, according to the provisions of Section 866 of the Revised Statutes.<sup>69</sup> Inasmuch as the defendant may have compulsory process for his witnesses, this use of a *dedimus* is unusual.<sup>70</sup>

§ 11. **Rules of Evidence—Original States.**—What are the rules of the federal courts, in criminal causes, respecting the competence of witnesses and the admissibility of evidence? Federal statutes covering the particular proposition are, of course, controlling. In the absence of such statute, will the court follow the rules of the particular state or the doctrines of the common law? If the rules of the particular state are to be followed, then the state law controls, in vital particulars, the sovereign sanctions of the United States, and the administration of criminal justice may be far from uniform. According to general theory, in the absence of statute, a federal court of law ought to follow the modes of activity historically practiced by courts of common law.<sup>71</sup>

This easy and practical recourse has been rendered untenable by certain federal decisions to which our attention must be directed. In *Reid v. U. S.*,<sup>72</sup> Chief Justice Taney was called upon to decide whether a co-defendant, to whom a severance had been granted, was a competent witness for his fellow accused. The trial was in Virginia, and a statute had been passed by that state in 1849, whereby such testimony be-

<sup>67</sup> *U. S. v. Angell*, 11 Fed. 34.

<sup>68</sup> *Kirby v. U. S.*, 174 U. S. 47.

<sup>69</sup> *U. S. v. Cameron*, 15 Fed. 794; *U. S. v. Wilder*, 14 Fed. 373.

<sup>70</sup> Cf. Sixth Amendment, R. S., Secs. 876, 878.

<sup>71</sup> *U. S. v. Sims*, 161 Fed. 1008; *Maxey v. U. S.*, 207 Fed. 327; *Erwin v. U. S.*, 37 Fed. l. c. 488; *U. S. v. Insley*, 54 Fed. l. c. 223; *Howard v. U. S.*, 75 Fed. l. c. 991; *U. S. v. Hammond*, 2 Woods l. c. 199; *U. S. v. Maxwell*, 3 Dill. l. c. 278.

<sup>72</sup> 12 How. 361.

fore inadmissible) had been rendered competent. After referring to the act relating to the qualification of jurors and the Crimes Act, the learned Justice stated that neither of these acts made any provision for the conduct of the trial after the jury was sworn. "It is obvious, however, that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. . . . But this could not be the common law as it existed at the time of the immigration of the colonists, for the Constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. It could not be the rule which at that time prevailed in England, for England was then a foreign country, and her laws foreign laws. And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. And this view of the subject is confirmed by the provisions in the act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors and the manner of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in the ulterior proceedings, after the jury was sworn, where there was no law to the contrary." This reasoning does not strike one as being irresistible.

The Chief Justice proceeds: "The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has been thus sanctioned by a practice of sixty years. They refer undoubtedly to English works and English decisions. For the law of evidence in this country, like our other laws being founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject, where it has not been changed by statute or usage. *But the rules of evidence in criminal*

*cases are the rules which were in force in the respective states when the judiciary act of 1789 was passed."*

It was therefore held that the statute of 1849 could not be given effect; because that would change the law laid down by Congress in adopting, by implication, particular state laws existing in 1789. It has been held, accordingly, in several inferior cases, that the admissibility of testimony in criminal cases depended upon the law of the state as it was when the original judiciary act was passed.<sup>73</sup>

§ 12. **The Same—New States.**—This rule, by its content, is necessarily limited to the original states. What rule is to be applied to the great army of states since admitted? So far as I know, the only occasion for clear expression upon this point ever presented to the Supreme Court was in *Logan v. U. S.*<sup>74</sup>

The Republic of Texas, some years before its admission into the Union in 1845, had passed a statute adopting the common law relating to evidence. In 1858, the state passed a law rendering all persons convicted of felony, in Texas or elsewhere, incompetent to testify as witnesses, unless pardoned and specifically restored to competency. In a prosecution for a federal crime committed in Texas, the Supreme Court held (in the *Logan* case) that the act of 1858 could not be given effect in the criminal courts of the United States; but that they must be governed by the common law, which was the law of Texas at the time that state was admitted into the Union.

Applying the principles of these cases, the Court of Appeals has held that the rules of evidence in a criminal case in Colorado were the known and established rules of evidence in force in Colorado at the date when the Judiciary and Crimes acts were given the same operation in Colorado as in other states; and that this date was the admission of Colorado into the Union. No law thereafter passed by the state could be permitted to affect criminal trials in the courts of the United States. "It may be," the Court said, "that in the entire ab-

<sup>73</sup> U. S. v. Gwynne, 209 Fed. 993; U. S. v. Hughes, 175 Fed. 238.

<sup>74</sup> 144 U. S. 263.

sence of any federal statute and of any known and established rules of evidence in the state at the time of its admission, the rules of evidence found in the common law would govern the courts of the United States in Colorado, in the determination of the questions here presented;" citing some of the cases hereinabove referred to. "But," the Court added, "that need not be decided now."<sup>75</sup> I know of no modern legislation changing this rule.

§ 13. **Self-Incrimination.**—Certain evidence is expressly excluded from the standpoint of public policy. The Fifth Amendment declares that "no person . . . shall be compelled in any criminal case to be a witness *against* himself." The statute making defendants competent at their own request, in further safeguard, declares that a failure to make such request shall create no adverse presumption.<sup>76</sup>

The privilege would be of little value if the Court or District Attorney were permitted to point an accusing finger at the significant silence of the defendant, and thereby virtually drive him on the stand. No comment upon such failure to testify can be lawfully made.<sup>77</sup>

The rule does not go so far as to deprive the District Attorney of his right to cross-examine the defendant in like manner as any other witness, so far as the cross-examination is pertinent to the examination in chief.<sup>78</sup>

The protection afforded by the constitutional provision is broadly construed, to insure that no witness, whether party or not, shall be compelled, in any investigation, to give testimony which might tend to show that he had committed a criminal offense still subject to punishment. It is even broad enough to shelter a witness against the extortion of any sources

<sup>75</sup> *Withaup v. U. S.*, 127 Fed. l. c. 534.

<sup>76</sup> 20 Stat. 30.

<sup>77</sup> *Wilson v. U. S.*, 149 U. S. 60; *McKnight v. U. S.*, 115 Fed. 972.

<sup>78</sup> *Powers v. U. S.*, 223 U. S. 303; *Sawyer v. U. S.*, 202 U. S. 150; *Fitzpatrick v. U. S.*, 178 U. S. l. c. 315; *Reagan v. U. S.*, 157 U. S. l. c. 305.

of information, that, if followed up, may supply the means of his conviction.<sup>79</sup>

The immunity from self-crimination (coupled with the closely allied guaranty against unreasonable searches and seizures) embraces not only oral testimony, but the compulsory production of the witness' private books and papers.<sup>80</sup>

This privilege is purely personal, and does not confer the right to refuse to answer, or to produce papers in his keeping, on the ground that his testimony will tend to incriminate some third person, even though such third person be the corporation of which the witness is an officer.<sup>81</sup>

The privilege against self-crimination has no reference to an artificial body like a corporation; nor can an officer of a corporation refuse to produce corporate records, even though they tend to criminate himself.<sup>82</sup>

There are certain well-defined exceptions to the operation of the general immunity. The witness may elect to waive his privilege, and having waived, must proceed through full disclosure; the offense may be barred by the statute of limitations; a general or special pardon or amnesty may have been validly extended.<sup>83</sup>

**§ 14. The Immunity Afforded by Statute.**—In order further to avoid the hindrance to public investigation, by the claim of privilege against self-incrimination, Congress has undertaken at various times to pass laws doing away with the refusal to testify. One of these was for a long time Section 860 of the Revised Statutes, reading as follows:

“No pleading of a party, nor any discovery or evidence obtained from a party or witness, by means of a judicial proceeding in this or any foreign country, shall be given in

<sup>79</sup> *Counselman v. Hitchcock*, 142 U. S. 547; *Ballman v. Fagin*, 200 U. S. 187.

<sup>80</sup> *Boyd v. U. S.*, 116 U. S. 616; *Wilson v. U. S.*, 221 U. S. l. c. 377.

<sup>81</sup> *Hale v. Henkel*, 201 U. S. 43; *Brown v. Walker*, 161 U. S. l. c. 597.

<sup>82</sup> *Wilson v. U. S.*, 221 U. S. 361.

<sup>83</sup> *Brown v. Walker*, 161 U. S. l. c. 597, 599.

evidence, nor in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovery or testifying as aforesaid."

This statute was put to the test in the celebrated case of *Counselman v. Hitchcock*.<sup>84</sup> In that case a commission merchant was summoned before the federal grand jury and asked whether he had received any special rates (other than the fixed tariff) on corn shipped by him. He declined to answer, upon the ground it might tend to incriminate him. Upon complaint to the Court, he was adjudged guilty of contempt and sued out *habeas corpus*. The Supreme Court held that the statute was not sufficiently broad to protect the constitutional privilege; and that no statute, *which left the party or witness subject to prosecution* after he answered the incriminating questions put to him, could supplant or take away his constitutional right to refuse to answer.

The section was repealed in 1910,<sup>85</sup> and has never been replaced by any law of similar comprehensiveness. In consequence of the decision in *Counselman v. Hitchcock*, a number of special statutes have been passed, of scope sufficiently broad to destroy the claim of privilege. Such a provision was enacted in 1893,<sup>86</sup> with reference to investigations before the Interstate Commerce Commission, and sustained by the Supreme Court.<sup>87</sup> The White Slave Law,<sup>88</sup> the Bureau of Corporations Law<sup>89</sup> and the Anti-Trust Law<sup>90</sup> contained similar clauses. These, and like statutes, furnish the "immunity bath," which was a favorite of the newspapers of a year or two past. The immunity afforded by such acts is generally

<sup>84</sup> 142 U. S. 547.

<sup>85</sup> 36 Stat. 352.

<sup>86</sup> 27 Stat. 443.

<sup>87</sup> *Brown v. Walker*, 161 U. S. 591.

<sup>88</sup> 36 Stat. 826.

<sup>89</sup> 32 Stat. 827.

<sup>90</sup> 32 Stat. 904.



not a guaranty against the initiation of a prosecution, but against successful prosecution, and is ordinarily invoked by plea in bar.<sup>91</sup>

§ 15. **Searches and Seizures.**—In this connection, brief reference should be made to the constitutional provision against unreasonable searches and seizures. The leading case upon this subject is *Boyd v. U. S.*,<sup>92</sup> where the historical evils are set forth which were intended to be counteracted.

It was held in *Adams v. New York*<sup>93</sup> that the defendant had no constitutional right to object, upon his trial in a state court, to the introduction of documentary evidence against him otherwise competent, upon the ground that it had been unlawfully seized upon a search of his premises conducted without a warrant.

In a later case, arising in an inferior federal court, the Supreme Court has, to a considerable extent, qualified the broad reasoning employed in the *Adams* case. In the last case,<sup>94</sup> the marshal, without any warrant, had entered defendant's house in his absence and seized a quantity of letters and documents, which were incriminating and competent evidence against the defendant. The latter filed a motion setting up the facts and requiring a return of the papers seized. The lower court denied the motion, and admitted the papers in evidence over objection. The Supreme Court held that the refusal to grant a seasonable application for return of the papers was a denial of the constitutional privilege, and reversed and remanded the cause.

<sup>91</sup> *Heike v. U. S.*, 217 U. S. 423.

<sup>92</sup> 116 U. S. 634.

<sup>93</sup> 192 U. S. 597.

<sup>94</sup> *U. S. v. Weeks*, 232 U. S. 383.

## CHAPTER XV.

### CRIMINAL LAW—CONCLUDED.

- § 1. Objections to Evidence.
- 2. Order of Proof—Examination of Witnesses.
- 3. Direction of Verdict—Review.
- 4. The Charge—Objections and Exceptions.
- 5. The Verdict.
- 6. The Motion for New Trial.
- 7. Motion in Arrest.
- 8. The Sentence.
- 9. The Review of Writ of Error.
- 10. *Supersedeas*.
- 11. Bail.

§ 1. **Objections to Evidence.**—I do not understand that the manner of making objection, or the order of production of testimony has ever been held to depend upon state laws. Objections to evidence offered in the federal courts must be made at the time, or they will be deemed waived, and the evidence given its natural probative effect.<sup>1</sup>

The general rule is that an objection to evidence must be so framed as to fairly indicate to the court and opposite counsel the precise point upon which a ruling is demanded. A statement that the evidence “is objected to,” or that it is objected to on the ground that it is “incompetent, irrelevant and immaterial,” is generally regarded as insufficient;<sup>2</sup> yet, where the evidence can, on no possible theory, be competent or material, so that the objection is apparent, a general objection of incompetency or immateriality has been allowed to be good.<sup>3</sup>

Where two defendants are jointly on trial, and evidence

<sup>1</sup> *Diaz v. U. S.*, 223 U. S. 442; *Benson v. U. S.*, 146 U. S. 325; *Farmers' Bank v. Greene*, 74 Fed. l. c. 441.

<sup>2</sup> *Sparf v. U. S.*, 156 U. S. 56 l. c.; *Prettyman v. U. S.*, 180 Fed. l. c. 37; *U. S. v. Shapleigh*, 54 Fed. l. c. 137.

<sup>3</sup> *Sparf v. U. S.*, 156 U. S. l. c. 57; *Sparks v. Oklahoma*, 146 Fed. 371; *Morgan v. U. S.*, 169 Fed. l. c. 251.

competent as against one is offered, it is wise to make separate and particular objection on behalf of the other.<sup>4</sup> So where part of a letter is competent, objection should be specifically directed to the incompetent portion.<sup>5</sup>

Not only is it necessary to make timely objection, but an exception must be immediately saved to any adverse action of the court.<sup>6</sup>

§ 2. **Order of Proof—Examination of Witnesses.**—The order of proof is largely in the sound discretion of the court.<sup>7</sup> As in civil cases, it is the general rule that a witness is a witness for the party propounding him only to the scope and extent of the direct examination; and that, as a general rule, cross-examination cannot be carried beyond those limits.<sup>8</sup>

In the same fashion, the re-examination is ordinarily confined to the matter of the cross-examination.<sup>9</sup> While it is unsafe to declare that such is the law, all these matters ought to rest in sound discretion.<sup>10</sup> It is within the discretion of the court to permit reopening of the case for further cross-examination or proof of matters that have been overlooked, and are material.<sup>11</sup> The allowance of leading questions, under particular circumstances, is plainly discretionary.<sup>12</sup>

<sup>4</sup> *Adamson v. U. S.*, 184 Fed. 714; *Cf. Sparf v. U. S.*, 156 U. S. 51.

<sup>5</sup> *Stirlen v. U. S.*, 183 Fed. 302.

<sup>6</sup> *Bram v. U. S.*, 168 U. S. 571 l. c.; *Bannon v. U. S.*, 156 U. S. l. c. 469; *Alexander v. U. S.*, 138 U. S. 353; *Foster v. U. S.*, 178 Fed. l. c. 174.

<sup>7</sup> *Putnam v. U. S.*, 162 U. S. l. c. 707; *Thiede v. Utah*, 159 U. S. l. c. 519; *Wood v. U. S.*, 16 Pet. l. c. 361; *Taylor v. U. S.*, 89 Fed. 954; *Turner v. U. S.*, 66 Fed. 280.

<sup>8</sup> *Sauntry v. U. S.*, 117 Fed. 132; *Harrold v. Oklahoma*, 169 Fed. l. c. 52; *Foster v. U. S.*, 178 Fed. l. c. 177; *McKnight v. U. S.*, 122 Fed. 926; *Safter v. U. S.*, 87 Fed. 329; for exceptions, *Cf. Wills v. Russell*, 100 U. S. 621; *McKnight v. U. S.*, 122 Fed. l. c. 928.

<sup>9</sup> *Ballew v. U. S.*, 160 U. S. l. c. 193.

<sup>10</sup> *Cf. Goldsby v. U. S.*, 160 U. S. l. c. 74; *Jacobs v. U. S.*, 161 Fed. 694.

<sup>11</sup> *U. S. v. Noelke*, 1 Fed. 426; *Alexis v. U. S.*, 129 Fed. 60; *Kalen v. U. S.*, 196 Fed. 888.

<sup>12</sup> *St. Clair v. U. S.*, 154 U. S. l. c. 150; *Nurnberger v. U. S.*, 156 Fed. 721; *Peters v. U. S.*, 94 Fed. 127.

§ 3. **Direction of Verdict—Review.**—At the conclusion of the case in chief, or at the close of the whole case, the defendant may ask for his discharge as a matter of law. This is usually done by a motion requiring the Court to direct a verdict of acquittal upon the evidence adduced. If all the facts in evidence, together with the inferences properly drawn therefrom, are insufficient to support a verdict of guilty, it is the duty of the Court to direct a verdict for the defendant.<sup>13</sup> As in civil causes, when such a motion is made at the end of the case in chief, and overruled, it is waived by the introduction of evidence for the defense; and, in order to be available, must be renewed at the close of all the evidence.<sup>14</sup>

In a proper case, if the motion for directed verdict be overruled and exception saved, the Appellate Court will reverse the conviction.<sup>15</sup> It is never competent for the Court to direct a verdict of guilty.<sup>16</sup>

Properly speaking, the jury is the sole judge of the facts. Unless, therefore, the question of insufficiency of the facts be made one of law by motion to direct the verdict, the Appellate Court should not review the testimony. But, in favor of life or liberty, even if no such motion be made, the Appellate Court will set aside the conviction and remand the cause, where all the testimony is before it, and is insufficient to support the judgment.<sup>17</sup>

§ 4. **The Charge—Objections and Exceptions.**—The testimony being concluded, and the motion to direct a verdict being overruled, the next step, according to usual practice, is the argument to the jury. In the event any improper statement is made by either counsel, objection should be promptly

<sup>13</sup> *France v. U. S.*, 164 U. S. 1. c. 681; *Sparf v. U. S.*, 156 U. S. 1. c. 100; *Duff v. U. S.*, 185 Fed. 101.

<sup>14</sup> *Short v. U. S.*, 221 Fed. 248; *Andrews v. U. S.*, 224 Fed. 418; *Simpson v. U. S.*, 184 Fed. 817; *Stearns v. U. S.*, 152 Fed. 900; *Burton v. U. S.*, 142 Fed. 57; Cf. *Gill v. U. S.*, 166 Fed. 419.

<sup>15</sup> *France v. U. S.*, 164 U. S. 1. c. 681.

<sup>16</sup> *Sparf v. U. S.*, 156 U. S. 1. c. 105; *U. S. v. Taylor*, 11 Fed. 470.

<sup>17</sup> *Clyatt v. U. S.*, 197 U. S. 207; *Williamson v. U. S.*, 207 U. S. 1. c. 452; *Wiborg v. U. S.*, 163 U. S. 632; *Ripper v. U. S.*, 179 Fed. 497.

made. If the court overrules the objection of the defendant, or if the Court fails to properly condemn the language objected to, but mildly deprecates it, exception should be saved.<sup>18</sup>

The arguments being concluded, the Court proceeds to charge the jury. It is the province of the Court to declare the law; and the duty of the jury to find the facts and apply to them the law laid down by the court.<sup>19</sup>

Because their verdict is a general conclusion, compounded of both law and fact, the jury may disregard the law; but in so doing (at least from a lawyer's standpoint) they are guilty of a species of anarchy.<sup>20</sup>

Usually, however, in the federal courts the danger is the opposite—that the judge, in his strong desire for justice as his trained eye sees it, may invade the province of the jury. In explaining the issues a federal court ought not, however, to confine itself to abstract statements of the law; but, wherever such a course is calculated to aid the jury in arriving at a just conclusion, may not only comment upon the evidence, but may even express its own opinions upon the facts; provided, that in so doing, law and facts are clearly distinguished, and the latter are left unequivocally and fairly to the independent judgment of the jury.<sup>20a</sup>

At the conclusion of a charge, and while the jury are at the bar,<sup>21</sup> the defendant excepts to such portions of the charge as are erroneous. In doing so, he should clearly point out the particular part to which the objection is directed, so as

<sup>18</sup> *Wilson v. U. S.*, 149 U. S. 1. c. 67; *Hall v. U. S.*, 150 U. S. 76; *Williams v. U. S.*, 168 U. S. 382.

<sup>19</sup> *Sparf v. U. S.*, 156 U. S. 51.

<sup>20</sup> *Cf. U. S. v. Batiste*, 2 Sumner 240; *U. S. v. Taylor*, 11 Fed. 470.

<sup>20a</sup> *Simmons v. U. S.*, 142 U. S. 148; *Starr v. U. S.*, 153 U. S. 614; *Allis v. U. S.*, 155 U. S. 117; *Wiborg v. U. S.*, 163 U. S. 632; *Ching v. U. S.*, 118 Fed. 538; *Steers v. U. S.*, 192 Fed. 1.

<sup>21</sup> *Hickory v. U. S.*, 151 U. S. 303; *Greene v. U. S.*, 154 Fed. 401; *Rogers v. U. S.*, 180 Fed. 54.

to give the Court an opportunity to correct it.<sup>22</sup> In general, I think the same rules are applicable as in civil charges.<sup>23</sup> The exceptions being disallowed, the defendant must request the court to give additional charges, and except to their modification or refusal.<sup>24</sup>

§ 5. **The Verdict.**—The books speak of *special* verdicts (in the technical sense), but they are practically non-existent in federal criminal practice.<sup>25</sup> The term *general verdict* is usually employed in connection with an indictment containing a number of counts, to indicate a summary and general finding applicable to all, as opposed to a verdict finding specifically with respect to each count. Most of the questions respecting verdicts have arisen where there is a plurality of charges.

It is settled that a verdict of guilty, without specifying any offense, is general, as applying to the offense or offenses specified in the indictment.<sup>26</sup>

A cause embracing several charges or several defendants is ordinarily not integral and indivisible. The jury may find the defendant guilty on some counts and not guilty on others.<sup>27</sup> It may find guilty on some counts and disagree on others, and the verdict will be received, and sentence denounced upon the counts found.<sup>28</sup> If the jury find on some counts against the defendant, and omit to find on the others,

<sup>22</sup> Cf. *Shelp v. U. S.*, 81 Fed. 694; *Edgington v. U. S.*, 164 U. S. Richards v. U. S., 175 Fed. 911; *Ball v. U. S.*, 147 Fed. 32; *Shelp v. U. S.*, 81 Fed. 694.

<sup>23</sup> Cf. *Shelp v. U. S.*, 81 Fed. 694; *Edgington v. U. S.*, 164 U. S. l. c. 365.

<sup>24</sup> *Isaacs v. U. S.*, 159 U. S. 487; *Goldsby v. U. S.*, 160 U. S. 77 l. c.; *Ripper v. U. S.*, 179 Fed. 497; *Schultz v. U. S.*, 200 Fed. 234.

<sup>25</sup> Cf. *U. S. v. Jackalow*, 1 Black. 484; *Statler v. U. S.*, 157 U. S. 271.

<sup>26</sup> *St. Clair v. U. S.*, 154 U. S. 134; *Statler v. U. S.*, 157 U. S. 277; *Snyder v. U. S.*, 112 U. S. 216; *Ballew v. U. S.*, 160 U. S. 187; *Claasen v. U. S.*, 142 U. S. 140; *Schraubstadler v. U. S.*, 199 Fed. 568; *Kaye v. U. S.*, 177 Fed. 147.

<sup>27</sup> *U. S. v. Wilson*, 176 Fed. 806.

<sup>28</sup> *Silvester v. U. S.*, 170 U. S. 262; *Dolan v. U. S.*, 133 Fed. 440.

and their verdict is received, it amounts to an acquittal upon the counts ignored.<sup>29</sup>

It frequently happens that there is a general verdict of guilty applicable to a number of counts, and some are bad. In such a case the verdict is presumed to refer to and is supported by the good counts.<sup>30</sup> So where, in such a case, the Court has awarded sentence *generally*, the judgment will be supported by any valid count, provided the punishment do not exceed that permitted for such count.<sup>31</sup>

Where the judgment, for any reason, cannot be supported, as rendered, by the good count, the Appellate Court will remand the cause to the lower court for proper sentence upon that count, and retrial as to the others.<sup>32</sup>

Where several have been indicted jointly, and the jury agree as to some, but disagree as to others, they may bring in their verdict as to the defendants whose fate has been determined upon, and report their disagreement as to the others; who will be thereafter put on trial before another jury.<sup>33</sup>

§ 6. **The Motion for New Trial.**—State statutes respecting the filing and disposition of motions for new trial are not applicable to criminal causes in the federal courts.<sup>34</sup> Federal statutes prescribe no limit of time within which such a motion must be filed in criminal cases.<sup>35</sup>

The matter, on general principles, rests upon the common law. Until judgment the case would seem, for the purposes of such a motion, to be *in fieri*. Where the judgment is rendered after the term of the verdict, it would be prudent, perhaps, to see that the motion was filed before judgment.<sup>36</sup> It

<sup>29</sup> *Jolly v. U. S.*, 170 U. S. l. c. 408; *Doaly v. U. S.*, 152 U. S. l. c. 542.

<sup>30</sup> *Evans v. U. S.*, 153 U. S. 584; *Greene v. U. S.*, 154 Fed. 401.

<sup>31</sup> *Claasen v. U. S.*, 142 U. S. 140; *Evans v. U. S.*, 153 U. S. 608.

<sup>32</sup> *Ballew v. U. S.*, 160 U. S. 187.

<sup>33</sup> R. S. 1036; *Bucklin v. U. S.*, 159 U. S. 682.

<sup>34</sup> *U. S. v. Mayer*, 235 U. S. l. c. 69; *Trafton v. U. S.*, 147 Fed. 513; *U. S. v. Rogers*, 164 Fed. 520.

<sup>35</sup> *U. S. v. Rogers*, 164 Fed. 520.

<sup>36</sup> *Ibid.*

is clear that such a motion is too late when it is filed after the term at which judgment is pronounced.<sup>37</sup>

Sometimes local rules control the time, and settled local practice should be kept in mind.<sup>38</sup> Ordinarily the motion is filed prior to judgment and during the term at which the verdict is returned.<sup>39</sup> When filed in time, the motion may be continued from term to term.<sup>39a</sup>

It is the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court, and ordinarily the exercise of that discretion is not reviewable by writ of error.<sup>40</sup> Exceptional instances may arise of refusal to exercise, or plain abuse of this discretion.<sup>41</sup> Where there are several defendants, a new trial may be granted as to one, and refused as to the other.<sup>42</sup>

§ 7. **Motion in Arrest.**—Another method of attacking the proceedings, prior to judgment, is by motion in arrest of judgment. According to the common law (which I assume—in the absence of contrary local practice—to prevail) it could be made at any time after conviction and before sentence.<sup>43</sup> At common law, too, the filing of a motion in arrest waived the motion for new trial.<sup>44</sup> A motion in arrest of judg-

<sup>37</sup> U. S. v. Mayer, 235 U. S. 55; Trafton v. U. S., 147 Fed. 513; U. S. v. Malone, 9 Fed. 897.

<sup>38</sup> Cf. U. S. v. Malone, 9 Fed. 897.

<sup>39</sup> Cf. Kingman v. Western, Etc., Co., 170 U. S. 1. c. 678.

<sup>39a</sup> U. S. v. Claasen, 43 Fed. 69.

<sup>40</sup> Mattox v. U. S., 146 U. S. 140; Blitz v. U. S., 153 U. S. 308; Moore v. U. S., 150 U. S. 57; Harless v. U. S., 92 Fed. 353; Chadwick v. U. S., 141 Fed. 225; Higgins v. U. S., 185 Fed. 710; Frank v. U. S., 192 Fed. 864; Hedderly v. U. S., 193 Fed. 561.

<sup>41</sup> Cf. Mattox v. U. S., 146 U. S. 140; Dwyer v. U. S., 170 Fed. 160; Higgins v. U. S., 185 Fed. 710.

<sup>42</sup> Browne v. U. S., 145 Fed. 1.

<sup>43</sup> Cf. Bishop, New Crim. Proc., Sec. 1284; U. S. v. McInerney, 147 Fed. 183.

<sup>44</sup> Cf. Bishop, New Crim. Proc., Sec. 1268; but see U. S. v. Simmons, 14 Blatchf. 473.



ment lies only for matter apparent upon the record (meaning thereby the record proper).<sup>45</sup>

On such a motion the indictment or information will receive a most liberal construction with respect to all matters not of a substantial character.<sup>46</sup> It would seem to be prudent (and perhaps necessary) to save an exception to the overruling of a motion in arrest of judgment.<sup>47</sup>

§ 8. **The Sentence.**—In rendering sentence, the Court must follow the law explicitly as to the extent, mode and place of punishment.<sup>48</sup> Whenever the sentence involves corporal punishment, the defendant must be personally present and the record must so show;<sup>49</sup> but in cases of flight or voluntary absence, it may be doubted whether that doctrine applies.<sup>50</sup> In capital cases it is essential that the defendant be asked for any reasons he has why sentence of death should not be pronounced; and this must also appear by the record.<sup>51</sup> If a void or erroneous sentence be imposed, the defendant does not, therefore, necessarily go free. The Court may, upon the prisoner being brought before it, validly resentence him.<sup>52</sup>

In any event, a sentence is valid, in so far as its excess is separable.<sup>53</sup> It has been very recently decided by the Supreme Court that the District Court has no power (in the absence of a statute) to suspend or stay sentence indefinitely, and thereby arrogate to itself the prerogative of pardon.<sup>54</sup>

<sup>45</sup> U. S. v. Kilpatrick, 16 Fed. 765; U. S. v. McKnight, 112 Fed. 982; U. S. v. Marrin, 159 Fed. 767; U. S. v. Maxey, 200 Fed. 997.

<sup>46</sup> Cf. Dunbar v. U. S., 156 U. S. 185; Stearns v. U. S., 152 Fed. l. c. 905.

<sup>47</sup> Rodriguez v. U. S., 198 U. S. 156.

<sup>48</sup> *In re Bonner*, 151 U. S. l. c. 258.

<sup>49</sup> Breese v. U. S., 106 Fed. 680; *Ex parte Waterman*, 33 Fed. 29; Cf. Lewis v. U. S., 146 U. S. 370.

<sup>50</sup> Diaz v. U. S., 223 U. S. 442.

<sup>51</sup> Ball v. U. S., 140 U. S. 118; Cf. Turner v. U. S., 66 Fed. 289.

<sup>52</sup> *In re Bonner*, 151 U. S. 242; Williams v. U. S., 168 U. S. l. c. 389; Wechsler v. U. S., 158 Fed. 579.

<sup>53</sup> U. S. v. Pridgeon, 153 U. S. 48; Cf. *In re Swan*, 150 U. S. 637; *In re Welty*, 123 Fed. 122.

<sup>54</sup> *Ex parte United States*, 37 Sup. Ct. Rep. 72.

§ 9. **The Review by Writ of Error.**—Assuming (as is usual) that conviction and sentence are unsatisfactory, and that no pardon or commutation can be obtained or is desired, nothing ordinarily remains but a recourse to the Appellate Court.

Where the judgment is not void, the proper method of review is the writ of error.<sup>55</sup> The scope of this writ, as reaching only the record, or matters made part of the record by bill of exceptions;<sup>56</sup> the propriety of incorporating all exceptions in a single bill;<sup>57</sup> the preparation, authentication and filing of the bill of exceptions;<sup>58</sup> the application for and the allowance of the writ of error; the assignment of errors;<sup>59</sup> the service of the writ of error,<sup>60</sup> and the necessity for citation,<sup>61</sup> are all, so far as I can discover, in no wise substantially distinguished from the same proceedings upon writs of error in civil causes. In fact, the statutes and rules governing jurisdiction and procedure are so far the same, as to render inadvisable any attempt at separate treatment.

§ 10. **Supersedeas.**—Some attention should be paid to the subject of *supersedeas*. This is to be clearly distinguished from the related matter of *bail*. A *supersedeas* is a mere staying of execution of the sentence of the trial court, and has nothing to do with the question whether the accused shall be set at large or remain in custody.

No security is required to be given to the government upon a writ of error in a criminal case, because there are no damages and the government is not liable for or entitled to costs.

<sup>55</sup> *Bucklin v. U. S.*, 159 U. S. 680; *De Lemos v. U. S.*, 107 Fed. 121.

<sup>56</sup> *Claason v. U. S.*, 142 U. S. 140; *Clune v. U. S.*, 159 U. S. 590.

<sup>57</sup> *Lees v. U. S.*, 150 U. S. 476.

<sup>58</sup> Cf. *U. S. v. Train*, 12 Fed. 852; *Meldrum v. U. S.*, 151 Fed. 177; *Glickstein v. U. S.*, 215 Fed. 90; *Collins v. U. S.*, 219 Fed. 670.

<sup>59</sup> *Old Nick Williams Co. v. U. S.*, 215 U. S. 541; *Paraiso v. U. S.*, 207 U. S. 368; *Humes v. U. S.*, 182 Fed. 485; *Balliet v. U. S.*, 129 Fed. 689; *Harless v. U. S.*, 92 Fed. 353.

<sup>60</sup> *Old Nick Williams v. U. S.*, 215 U. S. 541.

<sup>61</sup> *In re Claasen*, 140 U. S. 200; Cf. *R. S.* 999; *Kerch v. U. S.*, 171 Fed. 366.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Those portions of Sections 1000 and 1007 of the Revised Statutes, which relate to security, have consequently no application. All that is necessary, therefore, in order to obtain a *supersedeas* in a criminal case is to sue out and serve the writ of error (in the same manner as in civil actions hereafter to be more particularly described) within sixty days after the rendering of the judgment complained of; *provided*, at least, that the judge or justice who signs the citation and allows the writ of error, directs that it shall operate as a *supersedeas*, which is the usual course.<sup>62</sup> It has even been said, by a very able Court, that a writ of error in a criminal case, when filed within sixty days from the judgment, operates as a *supersedeas* as a matter of right.<sup>63</sup>

§ 11. **Bail.**—In this connection, we may profitably examine more narrowly the subject of *bail*. The statutes relating specifically to bail for criminal offenses are Sections 1014, 1015, 1016, 1017, 1018 and 1019 of the Revised Statutes. In addition thereto, we have Rule 36 of the Supreme Court and Rule 35 of the Courts of Appeals. In the absence of local rules, the foregoing are all the statutory regulations of general application. The *residuum* of rules governing the subject ought to be derived from the common law.

At common law a defendant charged with felony was not entitled to bail during his trial;<sup>64</sup> and there is strong ground for saying there was no bail after a verdict of guilty.<sup>65</sup>

The statutory regulations of the United States have been framed upon the general theory that a defendant should not be absolutely compelled to suffer imprisonment until he has been finally adjudged guilty in the court of last resort.<sup>66</sup>

<sup>62</sup> *In re Claasen*, 140 U. S. 200; *Hudson v. Parker*, 156 U. S. 277; Cf. Rule 35, S. C.; Rule 36, C. C. A.

<sup>63</sup> *McKnight v. U. S.*, 113 Fed. l. c. 452.

<sup>64</sup> *U. S. v. Rice*, 192 Fed. 720.

<sup>65</sup> *U. S. v. Hudson*, 65 Fed. l. c. 75; *U. S. v. Devlin*, F. C. 14, 955; *Bishop*, New Crim. Proc., Sec. 252; Cf. *Ex parte Harlan* 180 Fed. l. c. 135.

<sup>66</sup> *Hudson v. Parker*, 156 U. S. l. c. 285.

The ordinary recourse for bail will be to a United States Commissioner, a judge of the trial court, or a judge or justice of the Appellate Court.

Under Section 1014, there would seem to be no possible question as to the power of a commissioner to take bail from all persons arrested pursuant thereto.<sup>67</sup> Under Section 1015 the Commissioner has power to take bail not only after arrest, but at any stage of the proceedings—before a hearing or after—before indictment or information or after—before conviction or after—and even (at any rate where the bail has been fixed by the Court) pending a writ of error, that operates as a *supersedeas*.<sup>68</sup>

Under these sections, bail may be likewise taken by any federal judge or justice mentioned therein, but where a prosecution is actually pending in a particular court, by indictment or information, and the defendant is in the custody of that court, it is more usual to apply to the judge of that court for an order fixing the bail.

Under the rules of the Supreme Court and the Courts of Appeals above referred to, there is no doubt as to the power of the Appellate Court or a judge thereof to admit a plaintiff in error to bail, or to direct the trial judge to do so.<sup>69</sup> After affirmance by the Appellate Court *and* motion for rehearing overruled,<sup>70</sup> there is no power to continue the bail; but the mandate is frequently stayed, for a short period or periods, upon reasonable application, or the Court may defer the beginning of sentence.<sup>71</sup>

<sup>67</sup> Cf. *Hoeffner v. U. S.*, 87 Fed. 185; *Jones v. U. S.*, 134 U. S. 483.

<sup>68</sup> *U. S. v. Louis*, 149 Fed. 277; Cf., however, *Hoeffner v. U. S.*, 87 Fed. 185.

<sup>69</sup> *In re Claasen*, 140 U. S. 200; *Hudson v. Parker*, 156 U. S. 277.

<sup>70</sup> Cf. *Walsh v. U. S.*, 174 Fed. 621.

<sup>71</sup> Cf. *Walsh v. U. S.*, 177 Fed. 208.

## CHAPTER XVI.

### ADMIRALTY JURISDICTION.

- § 1. Early History.
- 2. The Extent of the Grant.
- 3. Scope and Inclusion of the Jurisdiction.
- 4. The Power to Change the Admiralty Law.
- 5. The Legislative Power of the States.
- 6. The Admiralty Lien.
- 7. Catalogue of Jurisdiction—Tort and Contract Locality.
- 8. Locality—Land or Water.
- 9. Locality—Must the Tort Be Maritime?—Death.
- 10. Principal Contracts—Building Contracts—Supplies—State Laws Conferring Liens.
- 11. Seamen's Contracts—Affreightment—Towage—Pilotage—Passengers.
- 12. Bottomry—Tolls—Wharfage—Consortship—Stevedorage.
- 13. Salvage—General Average—Demurrage.
- 14. Petitory and Possessory Actions.
- 15. Seizures—Survey and Sale.
- 16. Limitation of Liability.
- 17. Restraints Upon the Jurisdiction.

§ 1. **Early History.**—What we call admiralty law is a system of jurisprudence, regulating maritime commerce and its instrumentalities. As such, it comprises a body of substantive doctrine, and a system of procedure; both differing to some extent from common law and equity. Its content embraces a criminal as well as a civil jurisdiction; it has an *instance* side for the controversies of peace, and its *prize* side for the legitimation of captures in war. It exercises a jurisdiction over torts and crimes based upon their marine *locality*; and over contracts and property because of their maritime *quality* and destination. Born in the commerce of the Mediterranean, to be a common guide to the fleets that swept along the highway of nations—that *mare altum* which was outside the dominion of a nation as it was beyond the property of an individual—it was elevated by the years into a sort of *jus gentium* or common law of the maritime world.

Making its appearance as a distinct establishment in England about the beginning of the fourteenth century (at least under such a name) the Court of the Admiral must have been vigorous in the struggle for the perquisites of jurisdiction; for in the thirteenth year of Richard II we find a statute declaring that the admiralty must not “meddle henceforth of anything done within the realm, but only of a thing done upon the sea.”<sup>1</sup> Two years later an additional statute orders that “of things done within the bodies of counties, by land or by water, the admiralty court shall have no cognizance, but they shall be tried by the law of the land;”<sup>2</sup> although an exception was made as to murder and mayhem committed on great ships lying below the first bridges. Under these and other statutes, which were *not* declaratory of the common law, the courts of the latter system, with their characteristic insularity and jealousy of all things foreign, particularly aided by a man of vigorous intellect and remorseless pertinacity,<sup>3</sup> greatly reduced the English Court of Admiralty from its former pretensions.

Vice-admiralty courts were erected in most, if not all, of the American colonies; some by royal commission and acts of parliament—others by provision of charter—and still others by colonial legislation.<sup>4</sup> After the Declaration of Independence, most of the states maintained their own instance courts. This American jurisdiction was always larger than that exercised by the admiralty courts in Great Britain, and more conformable to the general scope of current continental systems. Our political forefathers must be conclusively presumed to have been entirely familiar with all these matters at the time the constitutional grant was framed.<sup>5</sup>

§ 2. **The Extent of the Grant.**—They declared that the judicial power should extend to “all cases of admiralty and maritime jurisdiction.” The grant in terms was not to the

<sup>1</sup> 13 Rich. II., Ch. 5.

<sup>2</sup> 15 Rich. II., Ch. 3.

<sup>3</sup> (Lord Coke.)

<sup>4</sup> *Waring v. Clarke*, 5 How. 441.

<sup>5</sup> *Ibid.*

federal *legislature*, but to the federal *courts*. While it has been held to be within the power of Congress to vest all the jurisdiction conferred by the Constitution in the federal courts, *exclusively*, yet, in the absence of a prohibitory federal statute, I see no reason for holding that this grant of admiralty jurisdiction is, in its essential nature, any more exclusive of the state courts than the jurisdiction over cases arising under the Constitution, laws and treaties of the United States. The judiciary act of 1789 (and its provision has ever since been continued) vested *exclusive original jurisdiction* of admiralty and maritime causes in the District Courts, with the saving of a common-law remedy where the common law was competent to give it. The meaning of this saving we have already discussed in our first lecture. The important thing for us here is, whether this saving is a real reservation or exception from a wider grant that would otherwise include it, or whether it is merely a legislative recognition of the limits of the power conferred by the Constitution. The problem is this: If Congress should pass a law leaving off this saving clause, and should confer exclusive jurisdiction over all cases of admiralty and maritime jurisdiction upon federal courts, would this wipe out and destroy the concurrent jurisdiction exercised for time immemorial by courts of common law (and by the state courts) in actions *in personam*, over causes that *might* be brought and adjudicated in a court of admiralty and, therefore, in the full sense, were included within its jurisdiction?

The problem is not an easy one. The authors of the *Federalist*, although they use general language, did not understand that the constitutional grant was broad enough to enable Congress to oust the state courts from their concurrent jurisdiction to administer a common-law remedy.<sup>6</sup>

Justice Story, in a note to his *Commentaries on the Constitution*, has expressed himself against so wide an interpretation.<sup>7</sup>

<sup>6</sup> Cf. No. 82.

<sup>7</sup> Sec. 1672; note 2; 5th Ed.

We must, however, give our own answer to the question. The language of the Constitution is: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction." This is capable, as it seems to me, of meaning either one of two things:

First: All cases of admiralty and maritime jurisdiction, peculiarly *as such*; that is to say, *not* over all the facts and circumstances that, when presented on an occasion and in a manner prescribed by the method of admiralty procedure, could be adjudicated either *in rem* or *in personam*—but over them *only* when they assumed such form of presentation; or,

Second: All cases, no matter in what form presented, containing the necessary elements of marine locality or maritime quality, that would justify the justification thereof by a court of admiralty, if its jurisdiction were appropriately invoked.

If the first only is meant, the result of conferring, by act of Congress, exclusive admiralty and maritime jurisdiction upon the federal courts, would be simply to say that the peculiar forms of process and remedy afforded by courts of admiralty could only be exercised by the federal courts. It certainly was not intended to say, or authorize Congress to say, that a state could not amend its laws of procedure *in personam*, so that they might become substantially similar to admiralty procedure *in personam*. The result of the first meaning is, then, simply to deny to the states, at the will of Congress, the right to so amend the procedure and jurisdiction of their courts, as to introduce into their common law (or equity) the action *in rem* against ships or other matters subject to such an action in the courts of the admiralty. If the second meaning be adopted, the forms of process and remedy would be immaterial; the subject-matter would be the essential thing; and under an exclusive grant of jurisdiction to the federal courts, no state court could exercise jurisdiction, under any *form*, over any class of cases cognizable in admiralty.

Much against my original impressions, I have been impelled, by all the indications I have been able to draw from



the decisions, to the opinion that the second meaning is probably correct.<sup>8</sup>

§ 3. **Scope and Inclusion of the Jurisdiction.**—In vesting the “admiralty and maritime jurisdiction” in its courts, the constitution must be deemed to have had reference to an existing jurisdiction customarily exercised by such courts. The term is used with the same apparent familiarity and assumed understanding of its significance as “law” or “equity” in other portions of that instrument. The clause seems to have attracted little discussion at the time.

It is established that it was not intended to connote thereby the narrow and restricted scope of admiralty as deformed by English statutes and decisions.<sup>9</sup>

It is equally well settled, I think, that it was not intended to confer the extreme latitude of admiralty powers belonging to continental courts.<sup>10</sup> It is probable that the framers of the Constitution had more particularly in mind that body of jurisprudence with the administration of which they were familiar in the colonies and especially in the admiralty courts of the states.<sup>11</sup>

The general maritime law has no intrinsic power to impose itself upon any country. It is operative there as law only so far as it has been received and adopted by the laws and usages of that country.<sup>11a</sup> As a common law of the sea, it is no more identical in all countries than the common law of Missouri, in its interpretation and application, is in every respect precisely coincident with the common law of Illinois. To an even greater extent than the common law, the maritime law has varied in the courts of different countries, each

<sup>8</sup> *Old Dominion Steamship Co. v. Gilmore*, 207 U. S. 1. c. 404.

<sup>9</sup> *Waring v. Clarke*, 5 How. 1. c. 459; *N. J. Steam, Etc., Co. v. Bank*, 6 How. 1. c. 385; *Cutler v. Rae*, 7 How. 1. c. 732; *Insurance Co. v. Dunham*, 11 Wall. 1; *Ex parte Easton*, 95 U. S. 68.

<sup>10</sup> *Bags of Linseed*, 1 Black. 108; *The Belfast*, 7 Wall. 624; *Ex parte Easton*, 95 U. S. 68.

<sup>11</sup> *Ex parte Easton*, 95 U. S. 68; Cf. especially *De Lovio v. Boit*, 2 Gall. 398.

<sup>11a</sup> Cf. *Ralli v. Troop*, 157 U. S. 386.

endeavoring to so shape and apply its general principles as to accord with local laws, policy and requirement.<sup>12</sup>

Our courts have, in effect, pursued this selective process, and have erected their decisions into the principal source of our admiralty law. In so doing, their views as to the law of admiralty have, to some extent, fluctuated, but they have endeavored, at all times, to follow and apply its true principles to the subject-matter in hand, and have never claimed any power to broaden or restrict its true limits.

§ 4. **The Power to Change the Admiralty Law.**—It cannot be supposed that the Constitution intended to crystallize forever—to render as changeless as the laws of the Medes and the Persians—either the rules of substance or procedure governing the transactions falling within that jurisdiction. No nation has ever regarded itself as precluded from making such legislative changes in its received maritime law as it may deem suitable to its domestic situation or national exigency. Great Britain, as well as other nations, had repeatedly exercised the power prior to the adoption of the Constitution.<sup>13</sup>

We have, however, a dual form of government; and our universe of legislative power is parceled out between the states and the nation. No legislative power is, in terms, conferred upon Congress with respect to admiralty and maritime matters; but it has a potentially exclusive control of all foreign interstate commerce. There is much to be found in the early cases coupling these two subjects,<sup>14</sup> and there *was* a time when the Supreme Court held that the admiralty and maritime jurisdiction could not attach to a vessel engaged solely in intrastate commerce.<sup>15</sup> To this day, I do not understand it to be held that the admiralty jurisdiction extends to a vessel engaged in navigating a lake that is purely in-

<sup>12</sup> Cf. *The Lackawanna*, 21 Wall. 558; *The Siren*, 13 Wall. 389.

<sup>13</sup> Cf. *The Lottawanna*, 21 Wall. 558.

<sup>14</sup> Cf. *N. J. Steam, Etc., Co. v. Bank*, 6 How. 1. c. 392; *Allen v. Newberry*, 21 How. 244.

<sup>15</sup> *Maguire v. Card*, 21 How. 248.

§ 4 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ternal within a state, having no connection with waters forming a highway for commerce between the states.<sup>16</sup>

Nevertheless, it is now clearly established that the power over interstate and foreign commerce and the admiralty power are not interdependent. It may be regarded as established, too, that Congress has a supreme power of legislation over substantive matters falling within the admiralty and maritime jurisdiction, though it is nowhere expressly conferred in the constitution. Its frank assertion by the Supreme Court is comparatively recent; and it may be characterized as a *resulting* power.<sup>17</sup>

In *Old Dominion Steamship Co. v. Gilmore*, the power to legislate is said to have been derived both from the commerce power and the grant of admiralty jurisdiction.<sup>18</sup>

The grounds from which the power may be said to result have been stated as follows: (1) The states could hardly have intended to reserve a legislative power where they had (potentially at least) absolutely surrendered their judicial power; (2) it is impossible, in view of the commerce power, for a state to enact any comprehensive or thorough-going set of rules applicable to all cases; (3) the subject-matter is such as to require an integral and substantially uniform system, which it would be hopeless to expect from the various states; (4) the mention of, and creation of courts to administer, admiralty and maritime jurisdiction has manifest reference to a general and uniform body of jurisprudence, which was intended to be preserved and administered as such.<sup>19</sup>

The first ground receives technical support from the law of crimes, where the admiralty jurisdiction is dependent upon locality; for if no state enforces the penal laws of another; if Congress has the power to confer upon its courts exclusive jurisdiction over all offenses falling within the admiralty and

<sup>16</sup> U. S. v. *Ferry Co.*, 21 Fed. 331.

<sup>17</sup> *Butler v. Steamship Co.*, 130 U. S. 527; *Ex parte Garnett*, 141 U. S. 1; *The Roanoke*, 189 U. S. 185; *The City of Norwalk*, 55 Fed. 98.

<sup>18</sup> 207 U. S. 1. c. 404.

<sup>19</sup> Cf. *The City of Norwalk*, 55 Fed. 1. c. 105.

maritime jurisdiction; then the federal courts could not punish under state laws, because penal laws of another sovereignty; neither could the state courts punish under state laws, where the federal courts had been given exclusive jurisdiction over all crimes in that locality. Fundamentally, however, the argument is unsound.

§ 5. **The Legislative Power of the States.**—Has the state any legislative power over this subject? And if so, what is to constitute, from time to time, the norm of its exercise? If the congressional power be deduced solely from the power to confer exclusive jurisdiction on the federal courts, shall we say that the state legislative power is excluded only so far as exclusive federal jurisdiction has been actually conferred by Congress, and conversely that the state's capacity for legislation is from time to time commensurate with the remaining jurisdiction of its courts? Such apparent intimations may be found in high quarters: "As the state courts in their decisions would follow their own notions about the law, and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature."<sup>20</sup>

The suggestion (so understood) is plainly not sound. Suppose a state statute give a right of action for death, and I bring a suit thereunder against a steamboat company, in a state court, alleging negligent conduct of master or crew; the company may plead the federal law of limited liability and limit or destroy the personal liability (unlimited save by the measure of the state statute) asserted by me in my common-law action. Such an effect of the limited liability law cannot be founded upon an existing exclusive jurisdiction in the federal courts over actions *in personam*, because there is none such.<sup>21</sup>

The accuracy of any such suggestion is further impeached by the fact that state courts have never had any jurisdiction

<sup>20</sup> Old Dominion Steamship Co. v. Gilmore, 207 U. S. 1. c. 404.

<sup>21</sup> Cf. Butler v. Steamship Co., 130 U. S. 527; Loughlin v. McCauley, 186 Pa. St. 517.

to enforce a maritime lien by proceedings *in rem*; yet it has been held that the state legislatures might, as against domestic vessels in their home port, create a lien in favor of material—men, which would be enforced in a federal court of admiralty by a proceeding *in rem*.

The truth is, as I understand it, that the nature of the admiralty power is indissolubly linked with that of the commerce power; and that substantially the same rules are applied, as to the legislative power of state and nation, to these kindred and associated subjects. To the state, then, is left the power to enact *general* rules of property and contract (broad enough to include within their scope maritime property and contract) and local and police regulations of the sort permitted under the commerce power; subject, in all respects, to the paramount will of Congress, within the fair limits of the admiralty power.<sup>22</sup>

§ 6. **The Admiralty Lien.**—We are now in a position to envisage the scope and content of admiralty jurisdiction as a system of law. The admiralty had, what neither common law nor equity was originally acquainted with, a true jurisdiction *in rem*. Neither the common law nor the equitable *lien* was a *jus in re*. The court of admiralty regarded its peculiar creation—the maritime lien—as a *real* obligation owed by the thing itself—as due from that thing, independent of all prior or personal relationships. The ship and other maritime property are (in a sense) personified; they themselves owe the duty and are seized by the court to answer therefor.

At the same time, the court of admiralty exercises a jurisdiction against the *persons* who may be regarded as responsible for the creation of the obligation—whether *ex delicto* or *ex contractu*—that in this country embraces nearly all the subject-matters falling within the entire jurisdiction. So that from the apparent standpoint of procedure, the jurisdiction is divisible into actions *in rem* and *in personam*. It

<sup>22</sup> Cf. *The City of Norwalk*, 55 Fed. 98; *The Roanoke*, 189 U. S. 185; *Norton v. Switzer*, 93 U. S. 355.

must be remembered, however, that in reality the question whether or not a maritime lien is supportable is more than a question of mere alternative *procedure*; it is a question of the person or personification from whom a particular obligation is to be regarded as due. Nevertheless, I think it substantially accurate to say that (apart from statutory regulation) in every case (except bottomry, which is really a matter of contract) where a lien is given by the general maritime law—the admiralty has jurisdiction *in personam* against the person or persons responsible for the creation of the obligation.<sup>23</sup> The converse of the rule is by no means true.

The foundation of the admiralty lien is undoubtedly maritime necessity. A ship is made to plow strange seas, where owner and master are unknown, and mere personal responsibility difficult of effectual enforcement. Being in effect the obligation, for example, of the ship, the lien ought to exist only in cases where the personified vessel (for example) may be regarded as having failed to satisfy some legal or contractual obligation actually undertaken by it.

Thus it is the general holding that there is no lien for the breach of purely executory contracts, where no lien is reserved.<sup>24</sup>

**§ 7. Catalogue of Jurisdiction—Tort and Contract—Locality.**—The total jurisdiction of our admiralty courts (apart from crimes) may be said to embrace: (1) Torts; (2) contracts, express or implied; (3) petitory and possessory actions; (4) forfeitures and seizures; (5) surveys; (6) statutory proceedings. I omit the subject of Prize, which belongs to a distinct aspect of the court, and lies outside our purposes.

The jurisdiction with respect to torts is almost invariably

<sup>23</sup> *The Belfast*, 7 Wall. 624; *N. J. Steam Nav. Co. v. Bank*, 7 How. 1. c. 392.

<sup>24</sup> *Vanderwater v. Mills*, 19 How. 82; *Cf. Bulkeley v. Cotton Co.*, 24 How. 386; *The Strathnairn*, 190 Fed. 673.

declared to be dependent upon *locality*, i. e., the tort must be consummated upon navigable waters.<sup>25</sup>

The jurisdiction over contracts, on the other hand, is dependent upon *subject-matter*; the true criterion being whether the contract is *maritime* in nature—has reference to maritime service or maritime transaction.<sup>26</sup>

Taking up the question of *locality*, it has never been held by the Supreme Court that the jurisdiction was limited to transactions outside the body of a county. The contrary was constantly assumed, deliberately decided in *Waring v. Clarke*,<sup>27</sup> and has ever since been maintained.<sup>28</sup> Prior to 1851 the jurisdiction dependent upon *locality* extended only over the sea and inland waters where the tide ebbed and flowed. In that year, Chief Justice Taney held, in the celebrated case of the *Genesee Chief*, that the great lakes were to be included, although they had no tide;<sup>29</sup> and it has long been settled that the jurisdiction extends to all public navigable waters, which in their ordinary condition, either alone or in connection with other waters, form a continuous highway, over which a substantial commerce is or may be carried on, by means of navigation, between two or more states or with a foreign nation. Foreign waters, agreeing with the test laid down, are included; as well as artificial highways, like canals.<sup>30</sup> Whether, in the growth and accession of federal power, the rule is to be any further extended, I shall not undertake to predict.

<sup>25</sup> *The Plymouth*, 3 Wall. 20; *The Rock Island Bridge*, 6 Wall. 213; *Philadelphia, Etc., R. R. Co. v. Towboat Co.*, 23 How. 209; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

<sup>26</sup> *People's Ferry Co. v. Beers*, 20 How. 393; *The Belfast*, 7 Wall. 624; *New England Ins. Co. v. Dunham*, 11 Wall. 1; *Ex parte Easton*, 95 U. S. 68; *The Eclipse*, 135 U. S. 599; *Grant v. Poillon*, 20 How. 162.

<sup>27</sup> 5 How. 441.

<sup>28</sup> *Jackson v. Steamboat Magnolia*, 20 How. 296; *American Steamboat Co. v. Chase*, 16 Wall. 522; *The Commerce*, 1 Black. 574.

<sup>29</sup> 12 How. 443.

<sup>30</sup> *The Daniel Ball*, 10 Wall. 557; *Ex parte Garnett*, 141 U. S. 1; *Ex parte Boyer*, 109 U. S. 629; *The Robert W. Parsons*, 191 U. S. 17.

§ 8. **Locality—Land or Water.**—We must be careful to separate the land and the things appurtenant thereto from the water and its accessories. A wharf, bridge or pier built from the land out into the water is regarded as a continuation of the land.<sup>31</sup> So a dry dock, moored permanently to the shore, would be regarded as land, rather than water.<sup>32</sup>

On the other hand, a beacon, supported by piles and surrounded by navigable waters, is not a part of the land by which it is ultimately supported; but is regarded as so maritime in quality as to permit the maintenance of an action *in rem* against a vessel colliding with and inflicting injury upon it.<sup>33</sup>

A float of timbers, floored and roofed over, and merely fastened by lines to an adjoining wharf, is not land, but a thing accessory to the waters which support it.<sup>33a</sup> Where the injury is consummated or effectuated upon land, or a structure deemed a part thereof, the tort is not maritime and admiralty has no jurisdiction. Thus injuries to a warehouse by the projecting spars of a vessel;<sup>34</sup> the setting on fire of buildings by the negligent conflagration of a ship;<sup>35</sup> the tearing away, by a vessel, of the draw of a bridge;<sup>36</sup> are none of them cognizable in a court of admiralty.

Some nice questions arise, in this connection, with respect to personal injuries. Where a dock laborer is stowing copper in the hold of the ship, under the employ of a stevedore company, and was hurt by the derrick dropping its load down the hatchway, there would seem to be no doubt as to the consummation of the injury upon shipboard, and of the existence of admiralty jurisdiction.<sup>37</sup> Where a chute extended

<sup>31</sup> *Cleveland, Etc., Co. v. Steamship Co.*, 208 U. S. 316; *Martin v. West*, 222 U. S. 191.

<sup>32</sup> *Cope v. Dry Dock Co.*, 119 U. S. 625.

<sup>33</sup> *U. S. v. Evans*, 195 U. S. 361.

<sup>33a</sup> *Woodruff v. One Covered Scow*, 30 Fed. 369.

<sup>34</sup> *Johnson v. Elevator Co.*, 119 U. S. 388.

<sup>35</sup> *The Plymouth*, 3 Wall. 20.

<sup>36</sup> *Duluth Bridge Co. v. Steamer Troy*, 208 U. S. 821; *The John C. Sweeney*, 55 Fed. 540.

<sup>37</sup> *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.



from wharf to hold of vessel and lumber, sliding down, injured mate in the hold, the admiralty jurisdiction was sustained.<sup>38</sup>

In similar fashion, where a ladder was left unfastened to rail of vessel, and slipped along the side of the vessel as longshoreman descended, precipitating him to the dock, it was held that the nervous shock at least began at the vessel's side and the admiralty had jurisdiction.<sup>39</sup> This case is separated by a hair's breadth from the *Pickands* case cited above.<sup>40</sup>

§ 9. **Locality—Must the Tort be Maritime?—Death.**—On the other hand, where a ship itself is injured by an unlawful obstruction in public navigable waters, the substance and consummation of the tort is upon the ship, which floats upon—in a sense forms a part of the water over which the jurisdiction extends. Thus injuries to a ship from an anchor left without a buoy;<sup>41</sup> from collision with a pier unlawfully erected in the midst of navigable waters for the purposes of a log-boom;<sup>42</sup> from striking against abandoned piles negligently obstructing the maritime highway;<sup>43</sup> from contact with a sunken wreck near the dock;<sup>44</sup> are all cognizable in the admiralty.

It may be further observed that the term "tort" is not to be understood as merely commensurate with "trespass;" as including only injuries committed by direct force. It connotes, as well, all wrongs suffered as a consequence of the negligence or malfeasance of others, where the remedy at common law would be an action on the case.<sup>45</sup>

Nor, according to logical theory, is the jurisdiction limited to those occurring upon some vessel or instrument of navi-

<sup>38</sup> *Hermann v. Mill Co.*, 69 Fed. 646; Cf. *The H. S. Pickands*, 42 Fed. 239.

<sup>39</sup> *The Strabo*, 98 Fed. 998.

<sup>40</sup> Cf. *The Mary Stewart*, 10 Fed. 137; *The Mary Garrett*, 63 Fed. 1009.

<sup>41</sup> *Philadelphia, Etc., R. R. Co. v. Towboat Co.*, 23 How. 209.

<sup>42</sup> *Atlee v. N. W. Packet Co.*, 21 Wall. 389.

<sup>43</sup> *Philadelphia, Etc., R. R. Co. v. Towboat Co.*, 23 How. 209.

<sup>44</sup> *Panama R. R. Co. v. Shipping Co.*, 166 U. S. 280.

<sup>45</sup> *Leathers v. Blessing*, 105 U. S. 626.

gation; but ought, if the test be purely and simply one of locality, to embrace every species of tort, of whatsoever character, committed upon navigable waters. This leads, theoretically, to somewhat fantastic results; for, if two persons were swimming in the Mississippi River, and one should there assault the other, admiralty would apparently have jurisdiction *in personam*. So, if a passenger should utter a slander on shipboard, the same result would follow. Such considerations have induced occasional decisions to the effect that the tort must not only be committed upon navigable waters, but must be *maritime* in nature—have some relation to navigation;<sup>46</sup> and I must confess to a strong leaning in favor of this general limitation, although upon the facts of those cases its applicability may be questioned. An expression of opinion as to such extreme cases has recently been declined by the Supreme Court.<sup>47</sup>

It is impracticable to make an adequate catalogue of all the different species of torts that courts of admiralty have undertaken to redress. Collisions, assaults, other personal injuries, illegal seizures, spoliation, and unlawful withholding of possession are instances.<sup>48</sup>

The general admiralty law, in the absence of statute, recognizes no jurisdiction to award damages for wrongful death;<sup>49</sup> but state statutes usually confer such a right under their adoption or modification of Lord Campbell's Act. Such statutes, where they are applicable to the *situs* of the wrong, constitute a species of local legislation which will be enforced in admiralty by the federal courts.<sup>50</sup>

<sup>46</sup> Cf. *Campbell v. Hackfield*, 125 Fed. 696; *The St. David*, 209 Fed. 985.

<sup>47</sup> *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

<sup>48</sup> *Ex parte Easton*, 95 U. S. 68.

<sup>49</sup> *The Harrisburg v. Richards*, 119 U. S. 199; *The Alaska*, 130 U. S. 201.

<sup>50</sup> Cf. *Old Dominion Steamship Co. v. Gilmore*, 207 U. S. 398; *Deslions v. Compagnie Generale*, 210 U. S. 1. c. 138; *The Corsair*, 145 U. S. 335; *The Albert Dunois*, 177 U. S. 240; *Monongahela, Etc., Coke Co. v. Schinnerer*, 196 Fed. 375; *Trauffer v. Navigation Co.*, 181 Fed. 256; *The Schooner Lewers v. Kekanoa*, 144 Fed. 849.

§ 10. **Principal Contracts—Building Contracts—Supplies—State Laws—Conferring Liens.**—The following constitute the *contracts* most frequently mentioned as *maritime* in their nature: (1) Repairs, materials and supplies; (2) mariners' wages; (3) Affreightment and charter parties; (4) carriage of passengers; (5) marine insurance; (6) bottomry and respondentia bonds; (7) pilotage; (8) towage; (9) consortship; (10) tolls and wharfage; (11) stevedorage; (12) ransom.

Under the head of *quasi-contracts*, we shall place: (1) Salvage; (2) general average; (3) demurrage.

It is abundantly settled in this country that admiralty has no jurisdiction over contracts for the *building* of a ship. Until the nascent vessel has been committed to the element for which it is destined, it is, for all the purposes of admiralty, of no more concern to that court than any pile of wood or mass of iron.<sup>51</sup>

The exclusion goes, with respect to contracts, still further; and whatever contracts are made to complete the original construction and make serviceable the new vessel are equally outside the jurisdiction. This latter holding seems illogical, as applied to cases where the ship has been launched, and so has become a maritime being and personality; but it seems to be well settled in our jurisprudence.<sup>52</sup>

Given, however, a completed vessel, the admiralty has jurisdiction in some form over all contracts for the making of repairs and the furnishing of necessary supplies or materials to or upon the particular vessel, whether at home or abroad.<sup>53</sup>

<sup>51</sup> *Tucker v. Alexandroff*, 183 U. S. l. c. 438; *People's Ferry Co. v. Beers*, 20 How. 393; *Roach v. Chapman*, 22 How. 129; *Edwards v. Elliott*, 21 Wall. 532; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. l. c. 11; *Perry v. Haines*, 191 U. S. l. c. 25; *Iroquois Transp. Co. v. De Laney Co.*, 205 U. S. 354.

<sup>52</sup> *Iroquois Transp. Co. v. De Laney Co.*, 205 U. S. 354; *Roach v. Chapman*, 22 How. 129; *In re Glenmont*, 32 Fed. 703; *The Paradox*, 61 Fed. 860; *Marmann v. The William Windom*, 73 Fed. 496; *The United Shores*, 193 Fed. 552.

<sup>53</sup> *The General Smith*, 4 Wheat. 438; *Meyer v. Tupper*, 1 Black. 522; *The Lottawanna*, 21 Wall. l. c. 592; *Endner v. Greco*, 3 Fed. 411; *Electro-Dynamic Co. v. The Electron*, 48 Fed. 689; *Jutte v.*

With respect to proceedings *in rem* for materials, repairs and supplies, it was until very recently the American rule that a distinction must be made between the home port of the vessel and foreign ports. When furnished at the home port, they were conclusively presumed to have been furnished upon the credit of the owners; so that no lien could arise, in the absence of statute. Acting under their power of local and quasi-police regulation, practically all the states passed statutes conferring a lien with respect to domestic vessels. These statutory liens could not be enforced, however, by a proceeding *in rem* in the state courts, because this was not a common-law remedy; but such a proceeding could be maintained in the federal courts to enforce the lien granted by the statute. This subject is discussed and settled, with his accustomed ability, by Justice Gray in *The Glide*.<sup>54</sup>

There was always a good deal of dissatisfaction with the distinction between home and foreign ports; and varying state laws must have greatly broken into the real uniformity of the admiralty law.

Finally, Congress passed an act in 1910, conferring a maritime lien for repairs, supplies or other necessities furnished to a vessel, whether foreign or domestic, and providing that it should not be necessary to allege or prove that credit was given to the vessel. The act expressly supersedes all state statutes purporting to create maritime liens in such cases.<sup>55</sup>

**§ 11. Seamen's Contracts — Affreightment — Towage — Pilotage—Passengers.**—Because of their habitual improvidence, mariners have always been regarded as, in a peculiar sense, the wards of the court. The statutes of the United States have provided an elaborate system for their protection, at such length as to negative any attempt here to set them forth. The word "mariner" or "seaman," as used in this sense, has a very wide content. It includes not only officers

Davis, 47 Fed. 592; *The Iris*, 100 Fed. 104; *Schulz v. Bosman*, 5 Hughes 97; *Schuchardt v. The Angeliue*, F. C. 12483b.

<sup>54</sup> 167 U. S. 606.

<sup>55</sup> Act of June 23, 1910; 36 Stat. 605; *The Ha Ha*, 195 Fed. 1013.

and seamen proper, but cooks and stewards,<sup>56</sup> pilots, engineers, firemen and deckhands,<sup>57</sup> clerks on a steamboat,<sup>58</sup> pursers,<sup>59</sup> ship carpenters,<sup>60</sup> coopers on a whaling voyage,<sup>61</sup> divers and wreckers on a wrecking vessel,<sup>62</sup> sealers on a sealing vessel,<sup>63</sup> ship surgeons,<sup>64</sup>—in short, all who are employed on ship-board to participate in navigation, or to directly promote the purposes of the voyage. It would seem, however, that musicians in a steamboat minstrel show would not be included.<sup>65</sup>

It should be especially observed that the master of a vessel (contrary to the rule with respect to the others) has no maritime lien for his wages, but only an action *in personam*, in the absence of statute.<sup>66</sup>

A *contract of affreightment* may be defined as a contract having for its direct object the conveyance of property upon navigable waters. In a broad sense it overlaps and includes certain phases of the *charter party*; which is defined as a contract by which an entire ship or some principal part thereof is let out at a fixed rate, either on a tonnage or a time basis, for a specified term or a specified voyage.<sup>67</sup>

Actions on policies of marine insurance were held by Justice Story, at circuit in a very elaborate opinion, dealing with the whole admiralty law, to fall within the maritime jurisdiction.<sup>68</sup>

<sup>56</sup> *Black v. The Louisiana*, 2 Pet. Adm. 268; *Sageman v. Brandywine*, Newb. 5; *Allen v. Hallet*, Abb. Adm. 573.

<sup>57</sup> *Wilson v. The Ohio*, Gilpin 505; *The North America*, 5 Ben. 486.

<sup>58</sup> *The Sultana*, 1 Brown Adm. 13.

<sup>59</sup> *The Prince George*, 3 Haggard Adm. 376.

<sup>60</sup> *Sheridan v. Furbur*, 1 Blatchf. & H. 423.

<sup>61</sup> *Macomber v. Thompson*, 1 Sumner 384.

<sup>62</sup> *The Highlander*, 1 Sprague 510.

<sup>63</sup> *The Ocean Spray*, 4 Sawy. 105.

<sup>64</sup> *Turner v. The Superior*, Gilpin 514, 524.

<sup>65</sup> *Trainer v. The Superior*, Gilpin 514.

<sup>66</sup> *The Steamboat Orleans v. Phoebus*, 11 Pet. 175; *Norton v. Switzer*, 93 U. S. 355; *Willard v. Dorr*, 3 Mason 92; *The Lena Mowbray*, 71 Fed. 720.

<sup>67</sup> Cf. *The Harvey and Henry*, 86 Fed. 656; *Vandewater v. Mills*, 19 How. l. c. 91.

<sup>68</sup> *De Lovio v. Boit*, 2 Gall. 398.

The question remained the subject of some doubt, until 1870, when the Supreme Court fully confirmed Justice Story's opinion, long after his death.<sup>69</sup>

It is abundantly settled that both contracts of affreightment,<sup>70</sup> as well as charter parties<sup>71</sup> are within the jurisdiction.

By *towage* is mean the application of extraneous propulsive force to the navigation of a vessel; and contracts therefor are plainly to be considered as maritime.<sup>72</sup>

*Pilotage* is the service of a navigator employed to steer or conduct a vessel through difficult or unfamiliar waters. The qualifications and duties incident to such functionaries are discussed, to some extent, in *Atlee v. Packet Co.*<sup>73</sup>

A contract for the transportation of passengers stands upon the same basis as for the carriage of freight.<sup>74</sup>

**§ 12. Bottomry — Tolls — Wharfage — Consortship — Stevedorage.**—A bottomry bond is defined by the Supreme Court as “an obligation, executed generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed upon; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void

<sup>69</sup> *Ins. Co. v. Dunham*, 11 Wall. 1.

<sup>70</sup> *The A. M. Bliss*, 2 Lowell 103; *Lands v. Cargo of Coal*, 4 Fed. 478; *U. S. Shipping Co. v. U. S.*, 146 Fed. l. c. 919; *Queen of the Pacific*, 61 Fed. 213; *N. J. Navigation Co. v. Bank*, 6 How. 344; *Morewood v. Enequist*, 23 How. 491; *The Belfast*, 7 Wall. 624.

<sup>71</sup> *Morewood v. Enequist*, 23 How. 491; *The Monte A.*, 12 Fed. 331; *The Alberto*, 24 Fed. 379; *Dunbar v. Weston*, 93 Fed. 472.

<sup>72</sup> *The Acadia*, Brown 73; *The Clarion*, Brown 74; *The W. J. Walsh*, 5 Ben. 72; *The Alabama*, 22 Fed. 449; *The Oscoda*, 66 Fed. 347; *Boutin v. Rudd*, 82 Fed. 685; *Knapp, Etc., Co. v. McCaffrey*, 177 U. S. 638.

<sup>73</sup> 21 Wall 389; Cf. *Ex parte Hagar*, 104 U. S. 520; *Ex parte McNeill*, 13 Wall. 236; *Hobart v. Drogan*, 10 Pet. 108.

<sup>74</sup> *The Moses Taylor*, 4 Wall. 411; *The Zenobia*, Abb. Adm. 48; *The Aberfoyle*, 1 Blatchf. 360; *The Pacific*, 1 Blatchf. 569; *Marshall v. Bazin*, F. C. 9125; *Woolston v. The Warner*, F. C. 18033.

§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

and of no effect in case of her loss before arrival.''<sup>75</sup> Such a bond may, however, embrace the cargo and freight, as well as the ship.<sup>76</sup> The principal difference between a bottomry bond and a *respondentia* bond is that the latter is limited to the cargo.<sup>77</sup>

In some of the cases, the term bottomry bond is used as applicable to *respondentia* loans. The latter term, at least, is much less frequent than formerly. Both demand a situation of actual necessity for the supplies or repairs sought, and an apparent urgency which would justify the taking of so radical a step without communication with the owners of the property affected.

By *tolls* are meant the charges for passing through canals or locks;<sup>78</sup> and *wharfage* is the compensation for making use of docks or other harbor conveniences.<sup>79</sup>

A contract of *consortship* is an agreement for the joint prosecution by two or more vessels of some common enterprise, such as fishing or salvage.<sup>80</sup>

*Ransom* is a contract to pay an agreed sum of money to redeem a captured vessel or cargo from the captors before condemnation in a court of prize.<sup>81</sup>

*Stevedorage* is the loading or unloading of a vessel engaged in navigation.<sup>82</sup>

§ 13. **Salvage—General Average—Demurrage.** — Taking up the so-called *quasi-contracts*, we shall define *salvage* to be a service, voluntarily rendered to a ship or other instrumentality of navigation, being in imminent peril of the sea,

<sup>75</sup> *The Grapeshot*, 9 Wall. 129.

<sup>76</sup> *Delaware Mutual Ins. Co. v. Gossler*, 96 U. S. 645.

<sup>77</sup> *Maitland v. The Atlantic*, Newb. 514; *Conard v. Ins. Co.*, 1 Pet. 386; *The Julia Blake*, 107 U. S. 418.

<sup>78</sup> *Monongahela Nav. Co. v. Connell*, 1 Fed. 218.

<sup>79</sup> *Ex parte Easton*, 95 U. S. 68; *The Kate Tremaine*, 5 Ben. 60; *The C. Vanderbilt*, 86 Fed. 785.

<sup>80</sup> Cf. *Andrews v. Wall*, 3 How. 568.

<sup>81</sup> *Maisonnaire v. Keating*, 2 Gall. 325.

<sup>82</sup> *The Gilbert Knapp*, 37 Fed. 209; *The Main*, 51 Fed. 954; *The Worthington*, 133 Fed. 725.

whereby the same, or its cargoes, or some part thereof, is restored to safety.

There are three principal essentials: (1) A marine peril; (2) service voluntarily rendered, when not required by an existing duty or a special contract; (3) success in whole, or in part, and that the service rendered contributed to such success.<sup>83</sup>

An express contract for salvage is not necessary; but its presence may, and usually will, affect the amount of the award. As a general rule, the action lies *in rem*.<sup>84</sup>

As I understand the late English decisions, a suit *in personam* may be maintained for salvage, without a contract, as upon an equitable assumpsit.<sup>85</sup> The nineteenth admiralty rule seems to confine the action *in personam* to cases of request; but a request may, under certain circumstances, be implied. Thus, where the property is public and not subject to process *in rem*;<sup>86</sup> where the property is taken from the salvor by replevin;<sup>87</sup> and where the property is surrendered and accepted by the owner;<sup>88</sup> it would seem that such an implication may be supported.

*General average* is a doctrine or rule of law, rather than a contract; but because it contains no element of *delict*, and involves an obligation as well as a corresponding right, deemed within the contemplation of the parties, interested in a voyage, we shall treat it as a *quasi-contract*.<sup>89</sup>

It may be defined as a proportionate contribution, assessed against the rescued portion of a maritime venture, (1) to compensate the owners of that portion thereof which was, voluntarily and under the stress of apparent necessity, sacrificed

<sup>83</sup> *The Sabine*, 101 U. S. 384.

<sup>84</sup> *The Sabine*, 101 U. S. 384.

<sup>85</sup> *The Port Victor*, 84 L. T. Rep. 1. c. 679; 9 Asp. Mar. Cas. 163.

<sup>86</sup> *Tebo v. New York*, 61 Fed. 692; *U. S. v. Connell, Etc., Co.*, 202 U. S. 184.

<sup>87</sup> *Hudson v. Whitmire*, 77 Fed. 846.

<sup>88</sup> *The Emblem*, 2 Ware 68; *Brevoor v. Fair American*, 1 Pet Adm. 87.

<sup>89</sup> Cf. *Ralli v. Troop*, 157 U. S. 386.



§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

by the master or other person in charge of the venture, to save the remainder from imminent peril; or (2) to apportion extraordinary expenses necessarily incurred by one or more of the parties to such venture for the general benefit of all interests embraced in the enterprise.<sup>90</sup>

It must not appear that the apparent necessity for sacrifice was brought about by negligence.<sup>91</sup> There would seem to be no doubt that general average gives rise to a maritime *lien*.<sup>92</sup> In *Cutler v. Rae*, it was held that there was no right *in personam*, enforceable in admiralty;<sup>93</sup> but this is apparently regarded as having been founded upon a narrow view of the admiralty jurisdiction, and as erroneous under modern decisions, although the case has never been expressly overruled.<sup>94</sup> An unconditional and unqualified surrender of the cargo to the consignee would seem to operate as a waiver of the lien, it being assimilated to the lien for freight.<sup>95</sup>

*Demurrage* literally means delaying, as of a ship from its employment. Three aspects may be pointed out: (1) As an element of damage in tort cases, where it is much like loss of time and earnings in an ordinary case of personal injury;<sup>96</sup> (2) as a measure of damage for failure to properly and promptly perform contracted repairs;<sup>97</sup> (3) as the allowance for undue detention of the vessel, owing to failure on the part of charterer or consignee to use the required diligence in taking on or discharge of cargo.

<sup>90</sup> Cf. *Star of Hope*, 9 Wall. 203; *Andrews v. Thatcher*, 3 Wall. 347; *Fowler v. Rathbones*, 12 Wall. 102; *Halsen v. Lord*, 92 U. S. 397; *Barnard v. Adams*, 10 How. 270; Cf. *Minneapolis, Etc., Co. v. Transit Co.*, 156 Fed. 424.

<sup>91</sup> *The Portsmouth v. Salt Co.*, 9 Wall. 682; *The Irawaddy*, 171 U. S. 187.

<sup>92</sup> Cf. *Dupont v. Vance*, 19 How. 162.

<sup>93</sup> 7 How. 729.

<sup>94</sup> Cf. *Dike v. St. Joseph*, 6 McLean 573; *National Underwriters v. Melchers*, 45 Fed. 643; *Wellman v. Morse*, 76 Fed. 573.

<sup>95</sup> Cf. *Cutler v. Rae*, 7 How. 729; *Sears v. Wills*, 1 Black. 108.

<sup>96</sup> Cf. *The Conqueror*, 166 U. S. 110; *The Cumberland*, 135 U. S. 234.

<sup>97</sup> Cf. *The Colombia*, 197 Fed. 661.

It is with this last aspect we are concerned here, as constituting, where the contract is silent, the breach of an implied obligation, which is redressible either *in rem* or *in personam*.<sup>98</sup>

As in the case of freight and general average, the maritime *lien* for demurrage may be lost by unconditional delivery.<sup>99</sup>

§ 14. **Petitory and Possessory Actions.**—The admiralty has a *petitory* and a *possessory* action, to vindicate respectively the title to, or the possession of, a vessel. The distinction between the two is rather in scope and object, than in form. The prohibitions of the common law took away the early power of English courts of admiralty to entertain a petitory action. They were left with the power only to adjudicate the right of *possession*, where no bona fide claim of *title* was in substantial question; until their jurisdiction in this regard was restored by comparatively recent statute.<sup>100</sup>

While originally a matter of some doubt, there has long been no question as to the right of our courts of admiralty to entertain either species of action.<sup>101</sup>

The object of the possessory suit is to restore to the rightful owner the possession of a ship unlawfully withheld; while in petitory suits the *title* to the property is litigated and sought to be enforced, independently of previous possession. In these proceedings, the ship itself may be arrested and proceeded against.

There is a further application of the possessory action to cases of cotenancy in a ship. Tenants in common of personal property have each a right to possession and use of the common property. To permit one co-tenant in possession to

<sup>98</sup> *Empire Transp. Co. v. Iron Co.*, 77 Fed. 919; *Randall v. Sprauge*, 74 Fed. 247; *Riley v. Iron Pipe Co.*, 40 Fed. 605; *The William Marshall*, 29 Fed. 328; *Hawgood v. Coal*, 21 Fed. 681; *275 Tons of Phosphate*, 9 Fed. 209.

<sup>99</sup> *Riley v. Iron Pipes*, 40 Fed. 605; *Egan v. Spruce Lath.*, 43 Fed. 480; *Barrels of Fertilizer*, 88 Fed. 984.

<sup>100</sup> 3 & 4 Vict., Ch. 65, Sec. 4; *Ward v. Pick*, 18 How. 267.

<sup>101</sup> Cf. *The Tilton*, 5 Mas. 465; *Ward v. Peck*, 18 How. 267; *The Friendship*, 2 Curt. 426; *Grigg v. The Clarissa Ann*, 2 Hughes 89; *The Bonnie Doon*, 36 Fed. 770.

§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

hold a ship rotting at her wharf, while he disputed with his associates as to what voyage, if any, she should undertake, would be contrary to the purposes for which she was designed as well as against the interests of a maritime state.

Wherever a majority (in value) of the shareholders wish to employ the ship in a particular venture, they may institute an action against the minority holding possession, and, upon entering into a stipulation safeguarding the interests of the dissentient, obtain possession by judgment of the Court; such minority, however, receiving no profit nor incurring any liability for losses. On the other hand, where the majority, having possession, is about to send out the ship upon a venture from which the minority dissent, the latter may proceed, by action in the admiralty, to compel the giving of security. Where there is a division among co-owners between keeping the ship idle or employing her upon a voyage, those in favor of employment are given possession, upon the terms above indicated.<sup>102</sup>

Where it happens that the parties in interest are equally divided, one moiety in favor of an employment, and the other moiety in favor of another, the Court on being appealed to, may decree a sale of the vessel to others and divide the proceeds among the persons entitled; thus putting an end to the ruinous controversy.<sup>103</sup>

§ 15. **Seizures—Survey and Sale.**—Many provisions of the Federal statutes authorize the seizure of property to enforce *penalties and forfeitures* imposed by law. From the beginning of the government it has been held that the place of the seizure determined the jurisdiction as between the admiralty and the law sides of the District Courts. A seizure upon navigable waters dispensed with the necessity for trial by jury, which was foreign to the general practice of courts of admiralty; while such a trial must be allowed with respect

<sup>102</sup> Cf. *Steamboat Orleans v. Shoebus*, 11 Pet. 1. c. 183.

<sup>103</sup> Cf. *Skrine v. Sloop Hope*, Bee Adm. 2; *The Seneca*, 18 Am. Jur. 486; *The Ocean Belle*, 6 Ben. 253; *The Annie H. Smith*, 10 Ben. 110; *Coyne v. Caples*, 8 Fed. 638.

to seizures upon land, although otherwise the procedure in the two classes of cases is similar. A proceeding by way of seizure to enforce a penalty or forfeiture is in the nature of an admiralty proceeding *in rem*; and is to be considered a civil, rather than a criminal proceeding. Instances of the jurisdiction are the seizure: Of a schooner for unlawful exportation of arms;<sup>104</sup> of a vessel for breach of non-intercourse laws;<sup>105</sup> of a ship engaged in the slave trade;<sup>106</sup> of wines imported under false entry;<sup>107</sup> of property used to promote rebellion;<sup>108</sup> of a vessel violating the law as to number of passengers.<sup>109</sup>

The proceeding known as *survey and sale* is certainly of rare occurrence in modern times. Where the master finds his ship in such a condition from injury or decay that she cannot safely proceed without repairs of a character and cost exceeding what a prudent owner would expend, or what he is able to obtain he might, by such a proceeding, get a survey and order of sale from the local court of admiralty. Policies of insurance have sometimes also provided for discharge of liability upon survey and finding of unsoundness.<sup>110</sup>

There are certain statutory provisions for *survey* of a vessel, at the instance of officers or seamen, to ascertain seaworthiness or require the making of necessary repairs.<sup>111</sup>

§ 16. **Limitation of Liability.**—To some extent the Harter Act, passed in 1893,<sup>112</sup> limits the liability of owners to shippers of property lost or damaged; and that act further regulates the content of bills of lading and their exculpatory

<sup>104</sup> U. S. v. La Vengeance, 3 Dall. 297.

<sup>105</sup> Schooner Betsy, 4 Cranch. 443.

<sup>106</sup> U. S. v. Sally, 2 Cranch. 406.

<sup>107</sup> The Sarah, 8 Wheat. 391.

<sup>108</sup> Confiscation Cases, 7 Wall. 454.

<sup>109</sup> U. S. v. Frank Silvia, 45 Fed. 641.

<sup>110</sup> Cf. Dorr v. Insurance Co., 7 Wheat. 581; Janney v. Insurance Co., 10 Wheat. 411.

<sup>111</sup> R. S. 4556, *et seq.*; 30 Stat. 757.

<sup>112</sup> 27 Stat. 445.

effect. When we speak of *Limitation of Liability*, however, the understood reference is to an amendment of our maritime law originally enacted in 1851,<sup>113</sup> and extended by subsequent amendments.<sup>114</sup> The effect of these statutes is: (a) To do away with any liability of a vessel owner for damage to cargo by fire, not caused by the design or neglect of such owner; (b) to relieve a vessel owner from any personal liability (over and above the value of his share in the vessel and her pending freight), (1) for embezzlement of any property on board, or for loss or damage to person or property for which an action in admiralty would lie, provided such owner be guilty of no personal neglect or complicity; (2) upon contracts or debts of maritime quality, incurred or undertaken by the master or other owners, without his privity.

It is impracticable, without transcending our limits, to go at length into the decisions interpreting and applying these provisions. Reference is given to a few of the more important.<sup>115</sup> This limited liability may operate as a shield or as a sword. It may be claimed by way of defense to an action, either in state or federal court, by plea or answer; or an action may be brought in the court of admiralty, pursuant to Rules 54 and following, and the ship surrendered or her value (or of the particular interest therein) paid over to a trustee.<sup>116</sup> In the latter case, a multiplicity of suits, pending or threatened, may be avoided; and such proceeding will supersede other suits asserting liability, so that their further prosecution may be enjoined.<sup>117</sup>

<sup>113</sup> R. S. 4282, *et seq.*

<sup>114</sup> 23 Stat. 57; 24 Stat. 80.

<sup>115</sup> *Norwich, Etc., Co. v. Wright*, 13 Wall. 104; *The Scotland*, 105 U. S. 24; *The Scotland*, 118 U. S. 507; *The City of Norwich*, 118 U. S. 468; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610; *Butler v. Steamship Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1; *Craig v. Continental, Etc., Co.*, 141 U. S. 638; *O'Brien v. Miller*, 168 U. S. 287; *Old Dominion S. S. Co. v. Gilmore*, 207 U. S. 398; *La Bourgogne*, 210 U. S. 95.

<sup>116</sup> *The Scotland*, 105 U. S. 24; *The Great Western*, 118 U. S. 520.

<sup>117</sup> *Providence Steamship Co. v. Hill*, 109 U. S. 578.

§ 17. **Restraints Upon the Jurisdiction.**—A word remains to be said with respect to the limitations of the jurisdiction. The court of admiralty exercises its jurisdiction in a strikingly equitable spirit, but it has not the characteristic powers of a court of equity. This may possibly be due to two reasons: (1) Because equity, as we know it, is a historical perversion and anomaly, and later in the development of its peculiar principles and remedial system; (2) because the exercise of an effectual equitable jurisdiction would have carried the admiralty far beyond its English limitations with respect to locality and subject-matter.

A court of admiralty cannot declare or enforce a trust;<sup>118</sup> or entertain a libel for specific performance;<sup>119</sup> or to reform an instrument for mistake in its execution;<sup>120</sup> or assume jurisdiction of a suit for an accounting, where it is not incident and necessary to the exercise of an established jurisdiction;<sup>121</sup> or undertake to foreclose or redeem a mortgage;<sup>122</sup> or review the action of arbitrators and set aside their award for fraud or irregularity.<sup>123</sup>

While, however, courts of admiralty have no general equity jurisdiction, and cannot afford equitable relief in a direct

<sup>118</sup> *The G. Reusens*, 23 Fed. 403; *The Kirkland*, 92 Fed. 407; *The Eclipse*, 135 U. S. 599; *Ward v. Thompson*, 22 How. 330; *Hill v. The Yacht Amelia*, 6 Ben. 475; *Kellum v. Emerson*, 2 Curtis 79.

<sup>119</sup> *The Eclipse*, 135 U. S. 599; *Andrews v. Essex Ins. Co.*, 3 Mason l. c. 16; *The Kynoch v. Ives*, 1 Newb. 205; *Paterson v. Dakin*, 31 Fed. 682, 94 Fed. 201.

<sup>120</sup> *The Eclipse*, 135 U. S. 599; *Andrews v. Essex Ins. Co.*, 3 Mas. l. c. 16; *Meyer v. Pacific Mail Co.*, 58 Fed. 923; *Williams v. Insurance Co.*, 56 Fed. 159, 94 Fed. 201.

<sup>121</sup> *The Eclipse*, 135 U. S. 599; *Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; *Kellum v. Emerson*, 2 Curt. l. c. 83; *Lyman v. The Willard*, 53 Fed. 599; *The John E. Mulford*, 18 Fed. 455; *The Emma B.*, 140 Fed. 771.

<sup>122</sup> *The Eclipse*, 135 U. S. 599; *Bogart v. The John Jay*, 17 How. 399; *The Sailor Prince*, 1 Ben. 461; *The J. B. Lunt v. Merritt*, F. C. 7247; *Britton v. Venture*, 21 Fed. 928; *The C. C. Trowbridge*, 14 Fed. 874; *The Clifton*, 143 Fed. 460.

<sup>123</sup> *The Union*, 20 Fed. 539.

§ 17 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

proceeding, they are in the habit of applying equitable principles to subjects within their jurisdiction;<sup>124</sup> and in many instances recognize equitable claims, not only in the distribution of proceeds under their control,<sup>125</sup> but, as we shall hereafter see, in dealing with the interest necessary to support an action, and perhaps in other respects.

<sup>124</sup> U. S. v. Cornell Steamboat Co., 202 U. S. 1. c. 194.

<sup>125</sup> *Ibid.*

## CHAPTER XVII.

### ADMIRALTY PRACTICE.

- § 1. Source of Practice—Rules—Practice Liberal.  
2. Parties Plaintiff—Real Parties in Interest.  
3. Apparent Legal Titles.  
4. Representation.  
5. Joinder of Plaintiffs.  
6. Defendants.  
7. Joinder.  
8. Claim and Intervention.  
9. Instances of Intervention.  
10. Claim and Defense.  
11. The Libel.  
12. Stipulations for Security—Poor Persons—Mariners.  
13. Process.  
14. Stipulations by Way of Bail.  
15. Process Against *Res*—Perishable Property—Stipulations.

§ 1. **Source of Practice—Rules—Practice Liberal.**—Admiralty procedure, like that of equity, was borrowed from ecclesiastical courts, which in turn derived their practice from the civil law.

In Clerke's Praxis, which is one of the best, as it is one of the oldest, manuals of English admiralty practice, we find constant reference to the handbooks of procedure then current in the ecclesiastical tribunals.

Exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction is vested in the District Courts, with the familiar saving of the common-law remedy.<sup>1</sup> As courts of admiralty, they are always open for certain purposes, like courts of equity.<sup>2</sup> Their forms and modes of proceeding are required to conform to the principles, rules and usages of courts of admiralty, unless otherwise provided by statute, the rules of the Supreme Court or the rules estab-

<sup>1</sup> J. C., Sec. 24, cl. 3; Sec. 256, cl. 3.

<sup>2</sup> J. C., Sec. 9.



lished by the respective District Courts for the exercise of their jurisdiction.<sup>3</sup>

Statutory regulations are comparatively few. In 1844 the Supreme Court formulated and published, pursuant to statutory authority, its "Rules of Practice . . . in Admiralty . . .," which, although occasionally subjected to criticism, with minor changes and additions, still constitute the principal source of the practice. The rules of the various Circuit Courts of Appeals should also be consulted; although they relate mostly to appellate practice in those courts. Each district has its own local rules, frequently in considerable number, to which constant reference is essential; but it will be impracticable for us to do more than occasionally refer to our own local regulations. Where statute, superior and local rules are silent, the decisions of the federal courts, and finally of the English courts, as well as the great historical sources, must be appealed to.

The volume of decision upon technical points of practice is inconsiderable, when compared with that in the common-law and equity jurisdictions. This is due, to some extent, to the smaller number of reported decisions in the admiralty; and to the fact that it is a peculiarly practical court, unaffected by the corrupting example of the common law (which more gravely infected equity procedure), and dealing more with considerations of convenience than of nice procedural theory.

§ 2. **Parties Plaintiff—Real Party in Interest.**—The first formal consideration is that of *Parties*. The party complaining is called the *libellant*; his adversary, the *respondent*. Where the suit is *in rem*, the *res* is not recognized as having any juristic capacity for its own defense; but must be represented by a person admitted as a *claimant*.

Taking up the subject of *libellants*, the rule most generally stated is that a suit in admiralty is properly brought, when brought in the name of the party or parties actually

<sup>3</sup> R. S., Secs. 913, 917, 918.

entitled to relief. By this I understand to be meant the real party in interest—the party immediately and beneficially entitled to the avails of the suit.<sup>4</sup>

Accordingly we find cases where a purely equitable title is recognized as sufficient. Thus an insurer, after the payment of the loss, may maintain in his own name an action against the vessel or vessels responsible for the injury, being subrogated to the position of the assured.<sup>5</sup>

The practice of instituting a suit in the name of one person (to whom the right has been assigned) for the benefit of another, is said not to obtain in admiralty, outside of certain exceptional cases.<sup>6</sup>

Illustrating the general rule, a mere volunteer, to whom claims for damages have been assigned solely for purposes of suit, and who has no other interest, cannot maintain a libel;<sup>7</sup> the assignors of claims for wages cannot maintain a proceeding in their own names for the real benefit of the assignee;<sup>8</sup> and where a bill of lading was to be delivered to the consignee, only upon payment of a sight-draft attached, which was never paid, the consignee has no standing as a libellant.<sup>9</sup>

§ 3. **Apparent Legal Titles.**—Nevertheless we find a number of instances where the courts have refused to look behind a title which would support an action at law, under analogous circumstances.

Thus, the carrier may sue for damages inflicted by an-

<sup>4</sup> Cf. *Fretz v. Bull*, 12 How. 466; *Swett v. Black*, 1 Sprague 574; *Cobb v. Howard*, 3 Blatchf. 524; *Cohan v. Rolling Wave*, F. C. 2959a; *Byrne v. Rockaway*, F. C. 2274; *Minturn v. Alexander*, 5 Fed. 119; *The Frank G. Fowler*, 8 Fed. 360; *Pacific, Etc., Co. v. Anderson*, 107 Fed. 973; *Eastfield v. McKeon*, 186 Fed. 357.

<sup>5</sup> *The Potomac*, 105 U. S. 630; *Mutual Ins. Co. v. The George, Olc.* 89; *The Frank G. Fowler*, 8 Fed. 360; *The Sidney*, 27 Fed. 119; *Phenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312.

<sup>6</sup> *Fretz v. Bull*, 12 How. 466; *Eastfield, Etc., Co. v. McKeon*, 186 Fed. 357.

<sup>7</sup> *The Trader*, 129 Fed. 462.

<sup>8</sup> *Logan v. Aeolian*, 1 Bond. 267.

<sup>9</sup> *The Prussia*, 100 Fed. 1. c. 488.

other upon the property carried, being regarded as the injured party;<sup>10</sup> the consignees have the apparent legal ownership of the consignment, and may sue in their own names for an injury thereto;<sup>11</sup> a libellant, who has been fully compensated for his loss by insurance, cannot be turned out of court by a respondent who attempts to set up the equitable rights, by way of subrogation, of third parties;<sup>12</sup> and it is no valid objection against a libel for repairs, that the libellant had a partner who is not made a party, where the contract was made with and the work done by the libellant.<sup>13</sup>

§ 4. **Representation.**—The doctrine of representation has a recognized place in certain proceedings; where it is usually explicable on the ground of convenience or the prevention of a multiplicity of suits. Little express authority has been found, however, for applying this doctrine of representation to the cases mentioned in the preceding section; which may be clarified by remembering the difficulty with respect to the real party in interest in code pleadings.

A libel for salvage, for example, may be propounded by the master alone, either on behalf of the owners, the crew and himself, or on behalf of the owners and crew or on behalf of the owners alone; or it may be filed by the owners alone, or in the name of the ship, for the benefit of all entitled.<sup>14</sup>

The agent of absent owners may file a libel either in his own name, or in that of his principals.<sup>15</sup>

<sup>10</sup> *Commercial Transportation Co. v. Fitzhugh*, 1 Black. 574; *Newell v. Norton*, 3 Wall. 257; *The Beaconsfield*, 158 U. S. 303; *The Steamer Paris*, 1 Ben. 529; *The St. John*, 7 Blatchf. 220.

<sup>11</sup> *The Vaughan v. Telegraph*, 14 Wall. 258; *The Thames v. Seaman*, 14 Wall. 98; *Houseman v. North Carolina*, 15 Pet. 49; *McKinley v. Morrish*, 21 How. 343; *Lawrence v. Minturn*, 17 How. 100; *The Nail City*, 22 Fed. 537.

<sup>12</sup> *Monticello v. Morrison*, 17 How. 153.

<sup>13</sup> *Simpson v. Baker*, 2 Black. 581.

<sup>14</sup> *The Camanche*, 8 Wall. 448; *Blackwell v. Tug Co.*, 10 Wall. 1.

<sup>15</sup> *The Thames v. Seaman*, 14 Wall. 98; *Houseman v. North Carolina*, 15 Pet. 40.

The master of a vessel, as the representative of all parties concerned, may maintain a libel, on behalf of the owners of the ship, the owners of the cargo, and all other persons injured, for damages caused by a collision.<sup>16</sup>

The master may sue, in his own name, in behalf of the owners, to recover damages for breach of contract of af-freightment.<sup>17</sup>

So it has been held that a bottomry bond, executed to an obligee, who was in reality an agent, can be sued upon by the nominal obligee;<sup>18</sup> a person who has a claim of his own, upon which the suit may be maintained, may join with it (apparently for the prevention of a multiplicity of suits) a claim held by him as mere assignee or agent, for the benefit of another, being authorized to represent such other in the action;<sup>19</sup> and an owner, who has been repaid only in part by insurance, may bring an action for the whole loss, in order to prevent two suits for the whole wrong.<sup>20</sup>

§ 5. **Joinder of Plaintiffs.**—With respect to the joinder of parties, it must be remembered that admiralty, like equity, is not a complete and self-sufficient system of jurisprudence. It accepts and administers many doctrines of the law with respect to the nature of property and contract. Whenever, therefore, by the general municipal law a contract or a property right is joint, we should expect to find admiralty, as a general rule, recognizing and applying that doctrine.

I should suppose, then, that wherever such a rule would not be productive of inconvenience, or multiplicity of suits, joint obligees or owners ought to sue jointly; and if one should refuse to join, that the use of his name might be compelled, upon furnishing proper indemnity.<sup>21</sup>

<sup>16</sup> *La Tourette v. Burton*, 1 Wall. 43; *Jacobsen v. Navigation Co.*, 93 Fed. 975.

<sup>17</sup> *Disney v. Furness Co.*, 79 Fed. 810.

<sup>18</sup> *Thompson v. Jachin*, F. C. 13, 959.

<sup>19</sup> *The Prussia*, 100 Fed. 484.

<sup>20</sup> *Fairgreve v. Insurance Co.*, 94 Fed. 686; Cf. *The Grand Republic*, 10 Fed. 398.

<sup>21</sup> Cf. *Richmond v. Copper Co.*, 2 Lowell 315; *The Richard Doane*, 2 Ben. 111; *Card v. Hines*, 35 Fed. 598.

It has been remarked, however, and I think truly, that the admiralty does not feel itself absolutely bound to observe the common-law rules with respect to integrality of cause of action or community of interest.<sup>22</sup>

Thus it is not fatal to include as a co-libellant one who is not a party to the contract sued upon;<sup>23</sup> a misjoinder of libellants, not objected to, is no obstacle to a decree;<sup>24</sup> a part-owner may sustain a petitory suit against a fraudulent possessor, and if his co-owners do not appear and object, the Court will award possession;<sup>25</sup> the owner may join charterer and assignee of bill of lading in an action for freight, seeking relief against either in the alternative;<sup>26</sup> and other instances might be cited.

It is, finally, the rule in admiralty, that all persons entitled on the same general state of facts to participate in the same relief (though they have technically separate causes of action) may join as libellants, whether the suit be *in personam* or *in rem*.<sup>27</sup>

§ 6. **Defendants.**—Little authority is to be found dealing with *defendants*. Where a maritime lien has been created, and the proceeding is *in rem*, the ship or other *res*, is ordinarily the sole respondent; except in the few instances where the rules leave open the joinder of proceedings *in rem* and *in personam*. The question is, from whom is the delictal or contractual obligation owing? Torts are usually regarded as joint and several, from the standpoint of liability.<sup>28</sup>

<sup>22</sup> The Sloop Merchant, Abbott Adm. 2.

<sup>23</sup> Talbot v. Wakeman, 19 How. Pr. 36.

<sup>24</sup> Wrecking Co. v. Phenix Ins. Co., 7 Fed. 236.

<sup>25</sup> The Friendship, 2 Curt. 426.

<sup>26</sup> Neall v. Curran, 93 Fed. 831.

<sup>27</sup> Fretz v. Bull, 12 How. 466; Rich v. Lambert, 12 How. 347; La Tourette v. Burton, 1 Wall. 43; The Prinz Georg, 19 Fed. 653; The Queen, 40 Fed. 694; Jacobsen v. Navigation Co., 93 Fed. 975; The Oregon, 133 Fed. 609; Eastfield v. McKeon, 186 Fed. 357.

<sup>28</sup> Cf. The Washington v. The Gregory, 9 Wall. 513; The Ruth, 178 Fed. 749; The Vosburgh, 93 Fed. 481; The St. Lawrence, 19 Fed. 328; The Franconia, 16 Fed. 149.

Whether a contractual liability is joint or several, is to be ordinarily determined, as I suppose, by the general rules of the applicable municipal law.<sup>29</sup>

An objection on account of the non-joinder of defendants may be raised by pleading in the nature of a plea in abatement or an answer in the nature of such a plea.<sup>30</sup>

§ 7. **Joinder of Actions—Admiralty Rules.**—Taking up the *joinder of actions* it is the general rule that a libellant may set forth in one libel as many causes of action as he has against the respondent, whether person or *res*. I think the better rule (in the absence of regulation to the contrary) is that there is no distinction between causes *ex delicto* and *ex contractu*, provided they can conveniently be heard together.<sup>31</sup>

Separate and distinct torts cannot be joined as against defendants not jointly liable;<sup>32</sup> and I can see no reason why the same doctrine should not apply to contract or property rights.

There is no inherent rule in the admiralty practice against joining a proceeding *in personam* with one *in rem*, where not productive of great inconvenience. Technically, of course, they constitute actions against separate defendants; both, however, may be regarded as responsible for the same duty or injury.<sup>33</sup>

The admiralty rules have explicitly provided for the forms of remedy in many instances, specifying what actions may be *in rem*, *in personam* or both; and where the rules have so provided, they are absolutely controlling.

Thus Rule 13 prohibits a suit for wages against owner *and*

<sup>29</sup> Cf. *The Sloop Merchant*, 1 Abbott Adm. 2.

<sup>30</sup> *Reed v. Hussey*, 1 Blatchf. & H. 525.

<sup>31</sup> *Pratt v. Thomas*, Ware 427; *Borden v. Heirn*, 1 Blatchf. & H. 293; *Welch v. Fallon*, 181 Fed. 875.

<sup>32</sup> *Thomas v. Lane*, 2 Sumn. 1; *Roberts v. Skolfield*, 3 Ware 184.

<sup>33</sup> *The Zenobia*, Abb. Adm. 48; *The Thomas P. Sheldon*, 113 Fed. 779; *The Baracoa*, 44 Fed. 102; *The Dawn*, 212 Fed. 564; *The City of Carlisle*, 14 Sawy. 179; *The Director*, 26 Fed. 708; *The Monte A.*, 12 Fed. 331; *Vaughan v. Sherry*, 7 Ben. 506; *The Martha Anne, Olc.* 18; Cf. *The Corsair*, 145 U. S. 335.

vessel;<sup>34</sup> nor can ship *and* owner be proceeded against for collision;<sup>35</sup> nor can a seaman sue *in rem* for an assault by the master under Rule 16.<sup>36</sup>

The admiralty courts have power to consolidate causes separately brought; which may be regarded as a species of joinder to save time and expense.<sup>37</sup>

§ 8. **Claim and Intervention.**—Before quitting this phase of the subject, some notice must be taken of *intervenors* and *claimants*.

“The word *claimant*, in all admiralty proceedings *in rem*, is used to denote the person who makes claim to the property seized as the owner thereof, and by virtue of such ownership or other interest therein, is admitted to *defend* the suit.”<sup>38</sup>

The Supreme Court, to my knowledge, has never undertaken to define an *intervenor*. In a broad sense, an *intervenor* is a person admitted to assert some right of his own in a pending litigation. In such a sense, it is perfectly clear that a *claimant* is a species of *intervenor*; because he is admitted into a litigation pending between the libellant and the *res*, in order to *defend* the latter. The difference technically would seem to be that a *claimant* is a person having such a proprietary interest, as to enable him to demand the possession and the delivery of the *res*.<sup>39</sup>

There are two rules dealing specifically with *intervention*, namely 34 and 43; and Rule 26 deals with *claim*.

Rule 43 declares in effect that any person having an interest in any proceeds in the registry of the court, shall have the right to petition for its delivery; and upon due notice to those

<sup>34</sup> *The Merchant*, 1 Abb. Adm. 1; *The Ethel*, 66 Fed. 340.

<sup>35</sup> Rule 15; *The Corsair*, 145 U. S. 335; *Steamship Zodiac*, 5 Fed. 220; *Ward v. Ogdensburg*, 5 McLean 622.

<sup>36</sup> *The Lyman D. Foster*, 85 Fed. 987.

<sup>37</sup> *R. S.*, 921; *The North Star*, 106 U. S. 1. c. 27; *Rogers v. Hurney*, 4 Cliff. 1. c. 590; *The Sarah E. Kennedy*, 25 Fed. 672; *The Eliza Lines*, 61 Fed. 308.

<sup>38</sup> *The Conqueror*, 166 U. S. 1. c. 122.

<sup>39</sup> Cf. *The Two Marys*, 12 Fed. 152; *U. S. v. Casks of Wine*, 1 Pet. 549; *The Skillinger*, 1 Flippin. 436.

adversely interested, the petition is heard in summary fashion and the proper order or decree made.

This rule applies only to claims asserting interest in any proceeds in the registry; and has no reference to cases where the third person seeks to come in and *contest the suit*. It was intended to allow persons like mortgagees, part owners, subrogated insurers, or other persons having an interest in a libelled vessel, to come into the suit so far as to get the remnants of the proceeds left after satisfying the libellant.<sup>40</sup>

The court of admiralty has power to distribute these surplus proceeds to all who can show a vested interest therein, in their rightful order of priority, and regardless of whether their claims are maritime in quality.<sup>41</sup> Intervention which constitutes the intervenor an actor in the principal suit is provided for by Rule 34; which declares, in effect, that any person who desires to intervene in a proceeding *in rem*, for his own interest, and who is entitled (according to the course of admiralty proceedings) to be heard therein, (1) must propound his matter in suitable form of allegation, and (2) make application for leave to file the same.<sup>42</sup> If leave is granted, the Court makes an order requiring the other party to make due answer thereto; and such further proceedings shall thereafter be had as justice may require. (3) At the time of filing his allegations, such intervenor must give a stipulation (or bond) with sureties, to abide the final decree and pay all costs, damages and expenses that may be awarded against him.

It will be observed that there is nothing beyond bare regulation of procedure in this rule. It does not say who is or not entitled to intervene in a proceeding *in rem*. It leaves that question to be determined by the general "course of admiralty proceedings."

<sup>40</sup> *The Ann C. Pratt*, 1 Curt. 340; *Propeller Monticello v. Mollison*, 17 How. 152; *Sheldrake v. The Chatfield*, 52 Fed. 495; *The Chief*, 142 Fed. 349; *Harper v. Bridges*, Gilpin 536; *The Advance*, 63 Fed. 704.

<sup>41</sup> *The Lottawanna*, 21 Wall. 558; *The Skylark*, 2 Biss. 251; *Schuchardt v. Babbage*, 19 How. 239.

<sup>42</sup> *The Clara McIntyre*, 94 Fed. l. c. 555.



§ 9 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

It requires the preparation of a formal pleading, an application to the Court for permission to file it, and the giving of a bond, when it is sought to intervene in a proceeding *in rem*; but it has absolutely nothing to say, by way of regulating or prohibiting interventions in suits *in personam*.

The whole subject of the *right* to intervene, under particular circumstances, is left to what we may call the common law of admiralty.

§ 9. **Instances of Intervention.**—As in the case of intervention in equity, nobody has ever attempted to formulate all the cases into an intelligible body of doctrine; and we shall not attempt it here.

Logical classification seems to be difficult, if not impossible; but I venture to say that interventions (of the character under discussion), in proceedings *in rem*, may be permitted:

(1) By persons who are really and substantially interested, but who are already *represented* before the court. Thus an absent owner, in a libel for forfeiture, may be allowed to intervene in person as a claimant, in the place and stead of his agent.<sup>43</sup> Under the 34th rule the insurer may be permitted to intervene, where the original claimant (the assured) has been divested of interest by abandonment to the insurer.<sup>44</sup> In a libel for collision, the insurer may likewise intervene, at any time, if he has the equitable right to the whole or any part of the damages.<sup>45</sup> Owners of the cargo may intervene in a suit for collision brought by the owners, at any time before the fund is actually distributed.<sup>46</sup>

(2) By persons who would have been permitted, at the beginning, to join as co-libellants. Thus an injured seaman

<sup>43</sup> *The Laurens*, 1 Abb. Adm. 302.

<sup>44</sup> *The Ann C. Pratt*, 1 Curt. 340; *Propeller Monticello v. Mollison*, 17 How. 152 l. c. 156.

<sup>45</sup> *Propeller Monticello v. Mollison*, 17 How. 152; Cf. *The Livingston*, 104 Fed. 918; *Mason v. Marine Ins. Co.*, 110 Fed. l. c. 455.

<sup>46</sup> *La Tourette v. Burton*, 1 Wall. 43.

may intervene as co-libellant in a collision case;<sup>47</sup> and a seaman's administrator may intervene in a libel for collision, to recover statutory damages for the death of his intestate.<sup>48</sup>

(3) By persons asserting liens against the *res*, while the same remains in custody of the court. For example, other lien creditors;<sup>49</sup> so where a vessel has been seized upon a libel by a material man, other material men may intervene to establish their lien claims.<sup>50</sup>

(4) By persons (as claimants) who have an interest in the *res* before the court—a general or special ownership or an interest by way of lien which they seek to protect as against the demand asserted.

For example, a mortgagee may intervene as claimant to defend against a libel for wages,<sup>51</sup> or to contest a libel for forfeiture;<sup>52</sup> or to defend against any claims which would oust his right.<sup>53</sup>

In fact, it has been stated broadly that all holders of liens are competent parties to intervene and contest the titles or claims of other lien-holders against the *res*.<sup>54</sup>

I see no reason why intervention should not be permitted in suits *in personam*, in analogous cases, or in any case where justice seemed to require it, and it was at all consistent with orderly procedure; but such cases are certainly very infrequent.

**§ 10. Claim and Defense.**—Although the ship or other *res* is regarded in a proceeding *in rem* as the real defendant charged with the obligation (the whole world being concluded by the judgment) such ship or *res* has no capacity to make its own defense. In every case where any defensive action is to be taken, some person must appear and claim an interest or a

<sup>47</sup> *The Queen*, 40 Fed. 694.

<sup>48</sup> *The Oregon*, 42 Fed. 78.

<sup>49</sup> *The Young Mechanic*, 3 Ware 58; Cf. *The Oregon*, 158 U. S. 186.

<sup>50</sup> *The Julia*, 57 Fed. 233.

<sup>51</sup> *The Emilie*, 70 Fed. 511.

<sup>52</sup> *The Old Concord*, 1 Brown Adm. 270.

<sup>53</sup> *Thomas v. Kosciusko*, F. C. 13, 901.

<sup>54</sup> *Furniss v. The Magoun*, Olc. 55.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

right to be heard on account of his relationship to the property. Such a person is the *claimant*, to whom reference has just been made.<sup>55</sup>

It is provided by Rule 26, that the party claiming the property shall verify his claim, stating that the claimant (by whom or on whose behalf the claim is made) is the true and *bona fide* owner, and that no other person is the owner thereof. If made by an agent or consignee, or by the master, oath must be made of authority from owner to make the claim. Upon putting in such claim, a stipulation (or bond) with sureties, must be filed for the payment of all costs and expenses which shall be awarded against the claimant by any final decree.

The claimant is an *actor*; and he is entitled to come before the court only by virtue of his proprietary interest. Before he can be admitted into the litigation as a party, his proprietary right should be satisfactorily established. His claim should be put in under oath, averring in positive and issuable form that right, so that it may be the subject of the preliminary contest.<sup>56</sup>

The mere putting in of a claim is not a defense to the action; the claimant upon becoming entitled to the status of a party must then put before the court the grounds of his defense in suitable form of allegation.<sup>57</sup>

As a matter of modern practice, the claim and answer are united, and application thereupon made for admission and leave to file. As I understand the practice under our local rules, claim and answer may be filed without allowance at any time after service of process and before default, as of course; subject, however, to contestation by the adverse side.<sup>58</sup>

§ 11. **The Libel.**—There was never such a thing as an original writ, and the first step in an admiralty suit is the

<sup>55</sup> Cf. *Steamboat Burns v. Reynolds*, 9 Wall. 237.

<sup>56</sup> *U. S. v. Casks of Wine*, 1 Pet. 549; *The Spark v. Lee Loi Chum*, 1 Sawy. 713; Cf. *The Boston*, 1 Blatchf. & H. 309.

<sup>57</sup> *The Spark v. Lee Loi Chum*, 1 Sawy. 713.

<sup>58</sup> Local Rule 26.

filing of the *libel*, which corresponds to the bill or declaration in chancery or legal proceedings,<sup>59</sup> and no process can issue prior to its filing.<sup>60</sup>

The general rules of pleading do not demand the technical precision of the common law; but there should be a clear and reasonably certain statement of the cause of action, so as to fairly advise the adverse party of the precise charge.<sup>61</sup>

There must be a substantial correspondence between allegation and proof, in order to prevent surprise; but the doctrines of departure or variance have, for the most part, never been strictly or technically enforced.<sup>62</sup>

The Admiralty Rules require that a *libel* in instance causes should state: (1) the nature of the cause, as being civil and maritime, and of contract, tort, or salvage, or otherwise as the case may be; (2) if *in personam*, the names, occupations and places of residence of the parties: and if *in rem*, the presence of the *res* within the district;<sup>63</sup> (3) with plainness and reasonable certainty, the allegations relied upon, digested into distinct paragraphs, or *articles*, so that the defendant may answer, distinctly and separately, the several matters contained in each article; (4) a prayer for process *in rem* or *in personam*, as required; (5) a prayer for such relief as the case requires and the court is competent to give.<sup>64</sup>

It is usual to add a prayer for general relief, the operation of which I suppose to be similar to that of such a prayer in classical chancery practice.<sup>65</sup>

<sup>59</sup> The *Atlas*, 93 U. S. l. c. 316.

<sup>60</sup> Rule 1.

<sup>61</sup> *Jenks v. Lewis*, 1 Ware 51; *The Bark Havre*, 1 Ben. 295; *The Sarah Ann*, 2 Sumner 206; *Dupont v. Vance*, 19 How. l. c. 171.

<sup>62</sup> *The Gazelle*, 128 U. S. 474; *Dupont v. Vance*, 19 How. l. c. 171; *The Sarah Ann*, 2 Sumner 206; *The Prudence*, 204 Fed. 66; *West v. Uncle Sam*, McAllister 505; Cf., however, *McKinlay v. Morrish*, 21 How. 343; *Campbell v. Uncle Sam*, McAllister 77; *Jenks v. Lewis*, 1 Ware 51; Cf. *Rich v. Lambert*, 12 How. l. c. 359.

<sup>63</sup> *The Propeller Commerce*, 1 Blatchf. l. c. 581; *The George Taulane*, 22 Fed. 799.

<sup>64</sup> Rule 23.

<sup>65</sup> Cf. *The Gazelle*, 128 U. S. 474.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

If the action be founded upon a written contract, it is proper and usual practice to attach a copy thereof.<sup>66</sup>

If founded upon negligence, the pleading should contain a clear statement of the acts claimed to have caused the injury, in such manner as to support the causal deduction;<sup>67</sup> where personal responsibility is asserted, the personal relation, such as ownership, must be averred;<sup>68</sup> a general allegation of performance in an action on contract is sufficient;<sup>69</sup> it is not necessary to anticipate matter of defense;<sup>70</sup> and the doctrine of curer by answer is recognized.<sup>71</sup>

Where several libellants join, for the sake of convenience and avoidance of multiplicity, the demands of each should properly be set forth in distinct articles.<sup>72</sup>

At the *foot*, or conclusion, of his libel, the libellant may propound a set of interrogatories, founded upon and limited by his averments, and require the respondent's answer thereto under oath.<sup>73</sup>

There is probably no general *requirement* for verification of a libel, although most local rules so provide;<sup>74</sup> but it is provided by Rule 7, that where the demand exceeds five hundred dollars and the suit is *in personam*, no warrant of arrest, either of the person or property of the respondent, shall issue without (1) a special order of the court; and (2) affidavits or other proper proof evidencing the propriety of the order.

<sup>66</sup> Sun, Etc., Ins. Co. v. Transportation Co., 14 Fed. 699; Card v. Hines, 33 Fed. 189.

<sup>67</sup> McWilliams v. Steam Tug, 2 Fed. 874.

<sup>68</sup> The Corsair, 145 U. S. 335.

<sup>69</sup> Dennis v. Slyfield, 117 Fed. 474.

<sup>70</sup> Brig Aurora, 7 Cranch. 382; The Margaret, 9 Wheat. 421; Mott v. Frost, 45 Fed. 897.

<sup>71</sup> The Syracuse, 12 Wall. 167; The Stephen Morgan, 94 U. S. 599.

<sup>72</sup> Sun, Etc., Ins. Co. v. Transportation Co., 14 Fed. 699.

<sup>73</sup> Rule 23; Havemeyer's Co. v. Compania Espanola, 43 Fed. 91; The Edwin Baxter, 32 Fed. 296.

<sup>74</sup> Cf. Coffin v. Jenkins, 3 Story 108; The J. R. Hoyle, 4 Biss. 234; Local Rule 2; Martin v. Walker, Abbott Adm. 579; Hutson v. Jordan, 1 Ware 385.

Special regulations are prescribed by Rule 22 for the libel in seizure cases, under revenue or navigation laws.

**§ 12. Stipulations for Security—Poor Persons—Mariners.**—It is rather an extraordinary fact, that with all the various provisions in the Admiralty Rules respecting stipulations, there is absolutely nothing requiring a stipulation or other security from the original libellant.

The ancient practice was otherwise; according to which the original libellant appears to have been bound, at any rate upon the demand of the defendant, to give surety for the due prosecution of the suit and the payment of costs, and for his own appearance in court, whenever required.<sup>75</sup>

It is probable that this subject was intended to be left to local discretion and regulation. All the local rules I have ever seen contain some such provisions.

In the Eastern District of Missouri, the subject is covered, in fragmentary and incomplete fashion, by the following, among other, regulations:

By local rule 5, no warrant can issue for the arrest of a vessel, her engines, machinery, tackle, apparel or furniture, in any proceeding *in rem*, until the libellant causes to be executed and filed, a stipulation, with sufficient sureties, in a sum double the amount claimed in the libel (unless the Court allows a smaller penalty) payable to the marshal, for the use of the owners and all others interested in the property, conditioned to prosecute the suit with effect and pay all costs and expenses adjudged against him, together with all damages that may accrue to the property or the owners and persons interested therein.

It is additionally required that in all such cases a separate stipulation for costs and expenses, in the sum of Two Hundred and Fifty Dollars, must be entered into and filed with the Clerk.<sup>76</sup>

In all suits *in rem* where no warrant of arrest is prayed

<sup>75</sup> Clarke's Praxis, Title 14; 2 Browne, Civ. & Adm. Law, p. 410.

<sup>76</sup> Local Rule 5.

§ 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

for, and in all suits *in personam* where the process is only a monition or summons, the libellant may have mesne process upon entering into a stipulation for costs and expenses; the amount of which, unless otherwise specially ordered, is Two Hundred and Fifty Dollars; which is the fixed or standing amount for all stipulations for costs and expenses in this jurisdiction, in the absence of a special dispensation.<sup>77</sup>

In cases where mariners or sailors petition to be made co-libellants in an action *in rem*, they must file a stipulation for costs and expenses in their respective proceedings in such sum as may be fixed by the clerk; not less, however, than fifty nor more than two hundred dollars.<sup>78</sup>

If a lien claimant intervenes and files his libel against a vessel or other *res* in custody, and unsold, he must give the same stipulations as an original libellant; but if the vessel or other *res* has been sold, and only its proceeds are in custody, his stipulation may be for costs and expenses only.<sup>79</sup>

Our local rules have nothing to say about suits *in forma pauperis*; nevertheless it was never the practice of the ancient admiralty to insist upon the giving of a fidejussory stipulation on the part of a worthy plaintiff, who was unable to furnish it. He was permitted to give, instead, a juratory caution, which was simply his own personal obligation. This same practice, or something analogous to it, has prevailed in the federal courts.<sup>80</sup>

Since the passage of the acts relating to suits and appeals *in forma pauperis*, there has never been any doubt that they applied equally to courts of admiralty.<sup>81</sup>

By a recent law, seamen may sue for wages or salvage or

<sup>77</sup> Local Rules 6 and 8.

<sup>78</sup> Local Rule 5.

<sup>79</sup> Local Rule 16.

<sup>80</sup> Cf. *Polydore v. Prince*, Ware 410; *Bradford v. Bradford*, 2 *Flippin* 280; *Thomas v. Thorwegen*, 27 *Fed.* 400; *The Phoenix*, 36 *Fed.* 272.

<sup>81</sup> Cf. *The Our Friend*, 131 *Fed.* 395; *Raymond v. Compagnie Generale*, 90 *Fed.* 105; *Donovan v. Salem, Etc., Co.*, 134 *Fed.* 316; *The Joseph B. Thomas*, 158 *Fed.* 559.

for the enforcement of beneficial statutes, without bond or deposit for fees or costs.<sup>82</sup>

§ 13. **Process.**—The libel being filed, and proper security given, the next step is the issuance of the process prayed for.

In a suit *in personam*, this may be (1) a simple *monition* (as it is called) in the nature of a summons to appear and answer the suit; or (2) a warrant of arrest of the person of the defendant, in the nature of a *capias*; or (3) a warrant of arrest of the person of the defendant, with a clause commanding (in the event he be not found) the attachment of his goods and chattels to the amount sued for: or (if such property be not found) the attachment of his credits and effects in the hands of named garnishees, to the said amount.<sup>83</sup>

The second and third of the foregoing clauses have been involved, as a matter of practice, in some obscurity. Sections 990 and 991 of the Revised Statutes declare in effect that no person shall be *imprisoned for debt* on federal process, where by the laws of the particular state such imprisonment shall have been abolished; that all modifications, conditions and restrictions thereon, under the laws of the state shall control the proceedings of the federal courts; and that *where any person is arrested or imprisoned*, under mesne or final federal process, in *any* civil action, he shall be entitled to discharge in the same manner as if he were arrested and imprisoned on like process from the state court.

In addition to the original form (as it then existed) of these statutory enactments, the Supreme Court in 1850 promulgated Rule 47, reading as follows:

“In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state, where an arrest is made upon similar and analogous process issuing from the state court.

“And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws

<sup>82</sup> Act of July 1, 1916.

<sup>83</sup> Rule 2.



§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

of the state in which the court is held, imprisonment for debt has been or shall hereafter be abolished, upon similar or analogous process issuing from a state court.”

There is considerable authority to the effect that the foregoing statutory and regulative provisions leave unfettered the power of the admiralty court to issue and execute a warrant for arrest of the person in a case sounding in *tort*, regardless of the state practice; conceding that it should follow the state practice in all cases where the claim sounds in *contract*.<sup>84</sup>

I do not believe that this is the law; and I feel sure that most of the districts in this country are in the habit of following the state rule as to arrest in all tort cases *in personam*, as well as in those arising out of contract.<sup>85</sup>

There are some cases holding that the right to attachment or garnishment depends upon the right to issue and execute a warrant of arrest;<sup>86</sup> but I cannot agree to this. I cannot believe that the abolishment of arrest was intended to wipe out and destroy the acknowledged and ancient practice of courts of admiralty to compel appearance by attachment. The proper practice would seem to be to issue a citation and couple with it the attachment clause, in the event the defendant be not found.<sup>87</sup>

If a warrant of arrest were a necessary prerequisite to attachment, there could be no attachment as against a corporation respondent.

§ 14. **Stipulations by Way of Bail.**—Under Rule 3, where a simple warrant of arrest of the person is issued and executed, the marshal may take bail from the defendant, by bond or stipulation, with sufficient sureties, conditioned that such

<sup>84</sup> *Hanson v. Fowle*, 1 Sawyer 497; *Bolden v. Jensen*, 69 Fed. 745.

<sup>85</sup> *The Carolina*, 14 Fed. 424; Cf. *Stone v. Murphy*, 86 Fed. 158.

<sup>86</sup> Cf. *The Chiesa v. Conover*, 36 Fed. 334; *The Bremena v. Card*, 38 Fed. 144.

<sup>87</sup> Cf. *Walker v. Hughes*, 132 Fed. 885; *Shewan v. Hallenbeck*, 150 Fed. 231; *Cushing v. Laird*, 4 Ben. 70, 107 U. S. 69; *Atkins v. Fiber Co.*, 1 Ben. 118; 18 Wall. 305; *Casey v. Leary*, 2 Ben. 530. See, especially, *Manro v. Almeida*, 10 Wheat. 473.

party will (1) appear in the suit, (2) abide by all orders of the court, and (3) pay the money awarded by the final decree, whether below or on appeal.

Under the provisions of Rule 47 and Section 990 and 991 of the Revised Statutes, the operation of this rule, and the conditions of the bond, are necessarily subject to state laws.<sup>88</sup>

Where goods and chattels, or credits and effects, have been attached in a suit *in personam*, the attachment may be dissolved by order of court, upon the respondent giving bond or stipulation, conditioned as specified in clauses (2) and (3) of the bond to be given upon arrest of the person.<sup>89</sup>

In default of appearance, the property attached may be condemned and sold to satisfy the decree rendered.<sup>90</sup>

Of course such a decree is not binding on the *person*, but only upon the property seized within the court's jurisdiction.<sup>91</sup>

**§ 15. Process Against Res—Perishable Property—Stipulations.**—In cases of seizure or other proceedings *in rem*, the ordinary process is a warrant of arrest of the ship, goods or other *res*; upon which the marshal takes the same into custody, giving public notice thereof and of the return-day and date of hearing, by publication in some newspaper published within the district, and designated by the court; and if there be no such paper, in such manner of public notice as the court may direct.<sup>92</sup>

When the suit *in rem* is against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, and such appurtenances are in the possession or custody of any third person, the Court may issue a citation to such person, to show cause, if any he has, why such tackle, etc., should not

<sup>88</sup> Cf. *Stone v. Murphy*, 86 Fed. 158.

<sup>89</sup> Rule 4; Cf. *Pope v. Seckworth*, 46 Fed. 858.

<sup>90</sup> Rule 21; *Manro v. Almeida*, 10 Wheat. 473; *Lee v. Thompson*, 3 Woods 167; *Boyd v. Urqhart*, 1 Sprague 423.

<sup>91</sup> *Boyd v. Urqhart*, 1 Sprague 423.

<sup>92</sup> Rule 9.

§ 15 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

be delivered into the hands of the marshal; and, in a proper case, may so order.<sup>93</sup>

If the property arrested be perishable, or liable to injury, deterioration, depreciation or decay by detention in custody pending the suit, the court may, on application of either party, order such property to be sold, and retain the proceeds (or so much thereof as shall constitute ample security) to satisfy the decree; or if the claimant deposit with the clerk such a sum of money as the court shall direct after an appraisal, or give a stipulation with sureties in a sum fixed by the court, conditioned to abide by and pay the money awarded by any final decree, the court will deliver such property to the claimant.<sup>94</sup>

The fact even that an appeal is pending, does not take away the power of the lower court to order the sale of deteriorating property remaining in its custody.<sup>95</sup>

In like manner, in order to prevent the great losses to the owners incident to detention, it is provided by Rule 11, that in any case where a ship is arrested, the court upon application may direct her delivery to the claimant, after due appraisal, upon his depositing with the clerk a sum of money fixed by the court, or upon his giving a stipulation conditioned as required by the foregoing rule; and in default of any such application, and subsequent prosecution thereof, the court may always order a sale of the ship, upon good cause shown by either party, and thereafter justly dispose of the proceeds.<sup>96</sup>

These powers may be exercised by the judge, in vacation, as well as when sitting as a court in term-time.<sup>97</sup>

To the same beneficent purpose, it is further provided by Section 941 of the Revised Statutes, as amended by the Act

<sup>93</sup> Rule 8.

<sup>94</sup> Rule 10.

<sup>95</sup> *Jennings v. Carson*, 4 Cranch. 1. c. 26; Cf. *Stoddard v. Head*, 2 Dall. 40.

<sup>96</sup> Rule 11.

<sup>97</sup> R. S. 940.

of March 3, 1899,<sup>98</sup> that whenever a warrant of arrest or other process *in rem* is issued (except in cases of seizures for forfeiture) the marshal shall stay the execution of such process, or discharge the property, on receiving from the claimant a bond or stipulation in double the amount sued for, with sufficient sureties, approved by the judge or (in his absence) by the collector of the port, conditioned to answer the decree.

Such bond or stipulation shall be filed in court, and judgment recovered against the parties thereto, upon rendition of the decree.

It is further provided by the said section, as amended, that the owner of any vessel, apprehending proceedings against her, may cause to be executed, and delivered to the marshal, a bond or stipulation with sureties approved by the judge, and conditioned to answer the decree in any or all cases that shall be brought in that court against his vessel; and no process shall thereafter be executed against such vessel so long as the amount of the bond shall remain at least double the aggregate amount claimed in all such suits. Like judgments may be entered on such general bond, as if it had been special in each case. Special bonds or stipulations may also be given in any one or more of such suits, thereby subtracting such cases from the liability of the general bond. Due notice of suits filed is to be regulated and ordered by the court.

<sup>98</sup> 30 Stat. 1354.

## CHAPTER XVIII.

### ADMIRALTY PRACTICE—CONCLUDED.

- § 1. Appearance and Default.
- 2. Local Practice.
- 3. Decree *Pro Confesso*—Hearing.
- 4. Defense.
- 5. Conflicting Terminology.
- 6. Exceptions—Exceptive Allegations.
- 7. Objection to Jurisdiction.
- 8. Requirements of Exceptions.
- 9. The Answer.
- 10. Set Off—Cross Libel.
- 11. Rule 59—Bringing in Additional Parties.
- 12. No Replication Necessary—Amendments of Libel to Confess and Avoid.
- 13. Amended and Supplemental Pleadings.
- 14. The Trial—Provisions for Jury—Commissions.
- 15. Appeals.
- 16. Appeals—Hearing *De Novo*.
- 17. Proceedings for Appeal.

§ 1. **Appearance and Default.**—Upon the return-day of the process (which is usually fixed by local rule) classical practice requires that the libellant should appear, in person or by counsel, to prosecute his suit; otherwise the defendant might put him in default, and cause his libel to be dismissed with costs.<sup>1</sup>

Rule 39 provides that “if in any admiralty suit, the libellant shall not appear and prosecute his suit, *according to the course and orders of the court*, he shall be deemed in contumacy and default; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.”

What is the “course” and practice of the particular court

<sup>1</sup> Clerke's Praxis, Title 10; Browne's Civil Law (2nd. Ed.), Vol. 2, p. 433.

is so peculiarly a local matter, that little would be gained by attempting to generalize.

The practice, generally, I think, is to make the process returnable at a fixed day and hour, and (in a suit *in personam*) directing the defendant to then and there appear and answer the libel.

In a suit *in rem*, the marshal returns that he has seized the ship or other *res*, and has given notice to all persons that the court will, on a given day and hour proceed to the hearing of the cause.

With respect to defendants in actions *in personam*, classical practice further required the appearance of the defendant at the return-day; at which time the proctor of the libellant, exhibited his authority to appear, and required the defendant to be thrice called; and in the event of his non-appearance, he was adjudged to have forfeited his bail, a reasonable part or all of which was adjudged to the libellant.<sup>2</sup>

When the admiralty rules were framed, the following provision was made in this regard: "If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the Court may, in its discretion, set aside the default, and, upon application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs up to the time of granting leave therefor."<sup>2a</sup>

Where the action was *in rem*, the ancient practice was, upon the appearance of the libellant at the return-day, for the Crier to make proclamation to all persons having, or claiming to have, an interest in the ship or other *res*, to appear and make answer. No person appearing, the first default was

<sup>2</sup> Clerke's *Praxis*, Title 9; Browne's *Civil Law*, p. 433 (2nd. Ed.).

<sup>2a</sup> Rule 29.

entered. This same proceeding was repeated on successive court days, until four defaults had been entered; whereupon a summary petition was exhibited to the Court, and the *first decree* was entered, giving possession of all or part of the *res* to the libellant, upon his giving security to answer for the right of any person claiming or intervening within a year. The usual practice thereupon was to file a petition, asserting as a polite fiction, that the ship or other *res* was in a perishable condition, whereupon the Court made an order of sale, applying the proceeds, as far as required, to claim and costs.<sup>3</sup>

This manner of proceeding, in suits *in rem*, was very clumsy, and it was never adopted, in its entirety, in America.

The books usually say that there should be a proclamation to claimants upon the return-day;<sup>4</sup> but it is a *single* proclamation, followed by immediate default.

The 29th rule uses the word "defendant," which is to be interpreted as including claimants as well as respondents; and the provisions of that rule are equally as applicable to suits *in rem* as *in personam*.

§ 2. **Local Practice.**—In most cases, in this country, the return-day of process is not the day intended or appointed for hearing the cause.

In this district, a formerly flourishing admiralty business has fallen into almost complete decay, and our practice, known to few, is become loose and unsettled.

Under our local rules, claim or answer may be filed at any time after the service of process and before the entry of a default;<sup>5</sup> and claim and answer are frequently combined. As a matter of general habit, they are filed as of course, in the clerk's office, without any special order of allowance.

The first Monday in each month, twenty days after its issuance, is the return-day for all process; but it frequently happens that the court is not in session.<sup>6</sup>

<sup>3</sup> Browne's Civil Law, Vol. 2 (2nd. Ed.), p. 396.

<sup>4</sup> Cf. Benedict Adm.; Conkling Adm.

<sup>5</sup> Local Rule 26.

<sup>6</sup> Local Rule 37.

There are no regularly appointed days of hearing unless the hearing day in equity be so considered; and in practice it is not observed.

The practice here is assimilated to that in equity, to a considerable degree, with the clerk noting defaults only upon direction of opposite counsel.

I have never heard of a proclamation on the return-day in this jurisdiction, either in cases *in rem* or *in personam*, and it is usual for claimant or respondent to take the whole of the return-day to plead; neither is it customary for either party to attend at the court or at the clerk's office, upon the return-day, in the absence of especial reason.

**§ 3. Decree Pro Confesso—Hearing.**—A default is an interlocutory judgment and not final.<sup>7</sup>

In cases of forfeiture, it would seem to establish the facts averred in the libel as effectively as they could be established at a hearing.<sup>8</sup>

The Court may hear the cause *ex parte*, either directly or by reference to a commissioner.<sup>9</sup>

Whether the Court would be justified in hearing no evidence, but could immediately (or within the reasonable time apparently contemplated by the rules) render final judgment upon the admissions involved in the default, may be made a matter of question.<sup>10</sup>

I suppose that where the amount due was plainly liquidated as by a bond or other written contract, the Court would not be bound to hear evidence beyond the production of the instrument, but that where the claim was unliquidated in its nature, the amount at least must be determined by evidence.<sup>11</sup>

The rules seem to contemplate an *ex parte* hearing.<sup>12</sup>

<sup>7</sup> The Lopez, 43 Fed. 95.

<sup>8</sup> Miller v. U. S., 11 Wall. 268.

<sup>9</sup> The Lopez, 43 Fed. 95.

<sup>10</sup> Cf. U. S. v. The Mollie, 2 Woods. 318.

<sup>11</sup> Cf. Cape Fear Co. v. Pearsall, 90 Fed. 435.

<sup>12</sup> But Cf. generally, Clerke's Praxis, Title 24; Rostron v. Waterwitch, 44 Fed. 95; The Ethel J., 190 Fed. 50.



§ 4 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

It is said in some cases that the default has the same effect as at common law.<sup>13</sup>

I understand the practice in this district to be, generally, to hear *ex parte*, at a setting conveniently fixed after the default taken.

As we observed from Rule 29, the Court, in its discretion, may set aside the default and permit answer at any time before final hearing and decree, upon payment of all costs of suit to the time of such permission granted.

It is further provided by Rule 40, that at any time *within ten days* after entry of final decree, the Court, in cases where default has been taken, *may* rescind the final decree and grant a rehearing to a defendant, upon such terms as the Court may deem proper.<sup>14</sup>

§ 4. **Defense.**—In the ecclesiastical law of the middle ages, the answer was really not a pleading, but an admission. It was required of the defendant, as a means of shortening the proof which the plaintiff would otherwise have been bound to adduce for every allegation in his libel.

There was, to be sure, in every litigated case an oral denial of the plaintiff's claims as set forth in his libel; and this was called the *litis contestatio*.

Affirmative defenses were set up by *exceptions* or by *defensive allegations*.<sup>15</sup>

The history of the *exceptio* from the days of Gaius down through the middle ages is a complicated one. Dr. Browne, whose work has been cited and relied upon by writers and judges in this country since early days, distinguishes *exceptio* as being an *equitable* defense of law or fact; while *defensio* he says was a defense of fact relying upon the *strictum jus*.

While this statement, as a historical matter, may be doubted, it is not necessary to go into the tangled life of the *exceptio*.

We do know that ecclesiastical law in England recognized *exceptions*, *responsive* (or *defensive*) *allegations*, and

<sup>13</sup> Miller v. U. S., 11 Wall. 268; Briggs v. Taylor, 84 Fed. l. c. 683.

<sup>14</sup> Cf. Snow v. Edwards, 2 Lowell 273.

<sup>15</sup> Browne, Civil Law, 2nd Ed., Vol. 2, p. 362, *et seq.*

*answers*. There is no reason why we should not follow that general classification in our treatment of admiralty; with one difference, however. The ecclesiastical exception apparently followed its Roman original in serving as the vehicle for raising questions of fact as well as of law. For our purposes this is confusing and unnecessary.

We shall divide the pleadings by way of defense into: (1) *Exceptions*—meaning thereby *exceptiones juris*—performing the functions of general and special demurrers; (2) *Exceptional allegations*—meaning thereby *exceptiones facti*—and operating like pleas to set up affirmative defenses of fact; and (3) *Answers*.

An answer in admiralty properly still performs, as I understand the matter, merely its old ecclesiastical functions of shortening the libellant's proof by the respondent's admissions.<sup>16</sup> The answer further may be regarded as taking the place of the oral ceremony known as *litis contestatio*, of which there is no longer any trace in modern practice. It is important to remember, however, that *exceptions* (in the old and broad sense) were divided into *dilatory* and *peremptory*; and that all dilatory exceptions must have been brought before the Court prior to the *litis contestatio*, or they were deemed waived. By dilatory exceptions were meant those which merely delayed, postponed the suit; while peremptory exceptions, if sustained, destroyed the cause of action.<sup>17</sup>

§ 5. **Conflicting Terminology.**—As a matter of fact, I have found it very difficult to extract clear rules as to defensive pleadings in admiralty, from either English or American decisions.

We find the demurrer spoken of occasionally;<sup>18</sup> yet there was no *demurrer* in ecclesiastical practice (originally at least)

<sup>16</sup> Cf. *The California*, 1 Sawy. 463; *The Dictator*, 30 Fed. 699.

<sup>17</sup> Cf. *The Martha*, 1 Blatchf. & H. 151; *Furniss v. The Magoun*, Olc. 55.

<sup>18</sup> Cf. *Knight v. The Attila*, Crabbe. 326; *The August Belmont*, 153 Fed. 639.

because every pleading must have been *admitted* or *allowed* by the judge.

*Pleas* were creatures of the common-law, and thence derived into equity; but we sometimes find *pleas* spoken of in admiralty.<sup>19</sup>

Occasionally the phrase *defensive allegation* is met with.<sup>20</sup>

All these things simply illustrate the greatest need of our whole law—an accurate and scientific terminology. This it is deprived of in large measure by its historical character, and the incapacity of a system based on precedent.

§ 6. **Exceptions—Exceptive Allegations.**—An *exception* then, as we shall employ it, means a pleading performing the function of a demurrer, general or special. For an instance of its employment as a general demurrer, the case of *The Pauline*<sup>21</sup> may be referred to;<sup>22</sup> and it has been held that, like a demurrer, it must be based upon matter apparent.<sup>23</sup> As a special demurrer, an exception may be employed to strike at misjoinder, multifariousness, insufficiency in allegation, scandal, impertinence, indefiniteness and irrelevancy.<sup>24</sup>

An *exceptive allegation* connotes every affirmative defense of fact. It is met with in certain decisions (not always in this precise sense)<sup>25</sup> and it seems to be so employed in the last edition of Benedict's Admiralty. So used, it includes matters in abatement and in bar—dilatory and peremptory defenses. When joined with an answer an exceptive allegation is regarded as so essentially a separate thing that it must not be

<sup>19</sup> Cf. *Crawford v. The William Penn*, 3 Wash. C. C. 484; *The August Belmont*, 153 Fed. 639.

<sup>20</sup> Cf. *The California*, 1 Sawy. 463; *The Whistler*, 13 Fed. 295.

<sup>21</sup> 1 Biss. 390.

<sup>22</sup> Cf. *The Active, Deady*. 165; *Quinn v. The Transport*, 1 Ben. 86.

<sup>23</sup> *Prince v. Lehman*, 39 Fed. 704; Cf. *The Seminole*, 42 Fed. 924.

<sup>24</sup> Cf. Rule 28; Rule 24; *White v. The Cynthia*, F. C. 17,546a; *Quinn v. The Transport*, 1 Ben. 86; *The Elizabeth Frith*, 1 Blatchf. & H. 195; *The Whistler*, 13 Fed. 295; *Merritt v. Chubb*, 113 Fed. 173; *Foster v. Compagnie Francaise*, 219 Fed. 351.

<sup>25</sup> *The Schooner Navarro*, Olc. l. c. 128; *The Prindeville*, 1 Brown 485; *The Seminole*, 42 Fed. 924; *The Haytian Republic*, 57 Fed. 508.

blended with the technical answer, but pleaded in a separate paragraph.<sup>26</sup>

§ 7. **Objection to Jurisdiction.**—When it is necessary, in an action *in personam*, to object to the jurisdiction, the English practice (professedly based upon that of the ancient admiralty) is to appear specially “under protest,” and move the court to dismiss the action.<sup>27</sup> A general appearance, without objection, would seem to cure any defect or insufficiency of process, and to waive any personal privilege.<sup>28</sup> Where, however, the action is purely *in rem*, a general appearance by a claimant is limited by the scope and nature of the action itself, and a personal judgment upon such appearance cannot be rendered against the owner.<sup>29</sup>

If the case be one where the libel may be amended to pray citation and judgment *in personam*, there should be thereupon either appearance or valid service of process.<sup>30</sup> While authorities are few, I assume generally that objections to the jurisdiction over *res* or *respondent* (where the want of jurisdiction aimed at is not a want of jurisdiction over *subject-matter*) should be made, in the event the defect is patent, by an exception, coupled with prayer for dismissal, specially appearing under protest for that purpose only.<sup>31</sup> Where the evidence of the defect is not patent, I should adopt an *exceptive allegation*, specially appearing under protest, with prayer for dismissal.<sup>32</sup> In other words, I should hesitate to couple a dilatory exception (whether of fact or law) with the answer, which corresponds to the old *litis contestatio*, in the absence of rules specially permitting such a practice. Nevertheless, I think it is not infrequent practice in the admiralty to do so.

<sup>26</sup> *The Whistler*, 13 Fed. 295.

<sup>27</sup> *The Vivar*, 2 P. D. 29 (1876).

<sup>28</sup> *The Monte A.*, 12 Fed. 331; *Mina v. Florio*, 23 Fed. 915; *The Ucayali*, 159 Fed. 800.

<sup>29</sup> *The Monte A.*, 12 Fed. 331; *The Ethel*, 66 Fed. 340; *The Lowlands*, 147 Fed. 986.

<sup>30</sup> *The Monte A.*, 12 Fed. 331.

<sup>31</sup> Cf. *The Lindrup*, 62 Fed. 851; *The August Belmont*, 153 Fed. 639.

<sup>32</sup> Cf. *The Bee*, Ware l. c. 339.

But in any case where the objection really went to jurisdiction over the subject-matter, this is not waivable; and it might be safely coupled with the answer.<sup>33</sup>

§ 8. **Requirements of Exceptions.**—Considering further the subject of *exceptions*, where one is filed which is equivalent to a general demurrer, it must be good as to the whole libel; and it is unavailing if any part of the libel is good.<sup>34</sup> An exception to a libel must be decided upon the pleading, so that it cannot be helped out by an affidavit;<sup>35</sup> but it seems that an exceptive allegation, setting up matters of which the Court will take judicial notice, may be superadded to exceptions.<sup>36</sup>

In a suit *in rem* exceptions to the libel can be filed only by intervening claimants.<sup>37</sup> It is said that an exception to the effect that a libel does not state facts sufficient to constitute a cause of action, it is too general;<sup>38</sup> but instances may be found where exceptions substantially as general have apparently been considered as sufficient.<sup>39</sup>

It is undoubtedly true that exceptions in general should be so clear and definite as to unmistakably indicate their ground, especially when they partake of the nature of special demurrers.<sup>40</sup> They may be filed to the interrogatories or any of them, as well as to the libel;<sup>41</sup> and they lie also to the answer to the libel, and the answers to the interrogatories.<sup>42</sup> Inasmuch as an answer is technically not a pleading, but a series

<sup>33</sup> Cf. *The Lindrup*, 70 Fed. 718; *The Haytian Republic*, 57 Fed. 508; *The John C. Sweeney*, 55 Fed. 541.

<sup>34</sup> *Dennis v. Slyfield*, 117 Fed. 474.

<sup>35</sup> *Prince v. Lehman*, 39 Fed. 704.

<sup>36</sup> *The Seminole*, 42 Fed. 924.

<sup>37</sup> *Florence Oil Co. v. Towboat Co.*, 128 Fed. 915.

<sup>38</sup> *The Active*, Deady 165.

<sup>39</sup> *The Pauline*, 1 Biss. 390; *Queen of the Pacific*, 61 Fed. 213.

<sup>40</sup> *Erie, Etc., Co. v. Towing Co.*, 184 Fed. 349.

<sup>41</sup> *Ibid.*

<sup>42</sup> *The Whistler*, 13 Fed. 296; *Morgan v. De Arrogetul*, 25 Fed. 624; *The Teaser*, 188 Fed. 721.

of judicial admissions, no exception in the nature of a general demurrer could lie thereto.

§ 9. **The Answer.**—It follows from the nature and purpose of an answer, that there is no such thing as a general denial or general issue.<sup>43</sup> It must respond fully, explicitly and distinctly to each separate article and allegation in the libel, in the same order as set forth and numbered therein; and must in like fashion respond to the interrogatories propounded at the foot thereof.<sup>44</sup>

If the sufficiency, fullness, distinctness or relevancy of the answer be excepted to, and the Court sustain such exceptions, proper responses will be compelled, at the cost of the defendant, by attachment or by ordering the matter of the exception to be taken *pro confesso*.<sup>45</sup> The plea of ignorance as to the truth of any allegation, accompanied by a statement of belief, is sufficient.<sup>46</sup> The omission to notice any allegation does not, of itself, admit it;<sup>47</sup> nor does the old chancery rule apply that a sworn answer can be overturned only by two disinterested witnesses, or by one witness and corroborating circumstances.<sup>48</sup>

The defendant may decline to respond to any allegation or interrogatory which will expose him to prosecution or penalty.<sup>49</sup> The answer of the defendant to allegations and interrogatories (except where the item in dispute does not exceed fifty dollars) must be upon oath or solemn affirmation.<sup>50</sup> In the event he be out of the country or unable from sickness or other casualty to make answer under oath, the court may

<sup>43</sup> *Virginia Ins. Co. v. Sundberg*, 54 Fed. 389; Cf. *The Dictator*, 30 Fed. 699.

<sup>44</sup> Rule 27.

<sup>45</sup> Rules 28 and 30.

<sup>46</sup> *City of Salem*, 10 Fed. 843; *The Teaser*, 188 Fed. 721.

<sup>47</sup> *The Dictator*, 30 Fed. 699.

<sup>48</sup> *Eads v. The H. D. Bacon*, 1 Newb. Adm. 274; *Andrews v. Wall*, 3 How. 1. c. 572.

<sup>49</sup> Rule 31; Cf. *In re Knickerbocker Steamboat Co.*, 139 Fed. 713.

<sup>50</sup> Rule 27; Rule 48.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

either dispense therewith or award a commission to take such oath and answer as soon as practicable.<sup>51</sup>

The defendant may append at the foot of his answer interrogatories to the plaintiff, touching the matters charged in the libel or set up in the answer, and require thereto the personal answer of the libellant, upon oath or affirmation. The procedure with respect to these is quite similar with that employed in the case of libellant's interrogatories.<sup>52</sup>

It is provided by Rule 25, that in all suits *in personam*, where no bail has been taken, or property attached, the Court *may* require the defendant, upon his appearance, to give a stipulation for costs and expenses.

§ 10. **Set-off—Cross-Libel.**—The rule more generally laid down is that matters arising out of independent transactions cannot be pleaded as a set-off in admiralty.<sup>53</sup>

The defendant may (whether the action be *in personam* or *in rem*) set up his answer (in separate paragraphs) any matter of recoupment or set-off, arising out of the transaction which is the subject-matter of the libel, and involving the same parties; and going to reduce or overcome the original demand.<sup>54</sup>

It is difficult to clearly distinguish most instances proper for set-off by answer from the matters to be set up in a *cross-libel*, save in two respects, namely, that the set-off can only go in diminution of the libellant's demands, whereas the crossbill permits the recovery of any excess; and the cross-libel is necessary for any other affirmative relief.

The subject-matter of the cross-libel and most of its inci-

<sup>51</sup> Rule 33.

<sup>52</sup> Rule 32; Rule 33.

<sup>53</sup> *Emery Co. v. Tweedle Co.*, 143 Fed. 144; *Roney v. Chase, Etc.*, Co., 160 Fed. 268; *The Oceano*, 148 Fed. 131; Cf. *The C. B. Sanford*, 22 Fed. 863; *American Barge Co. v. Chesapeake, Etc., Co.*, 116 Fed. 857.

<sup>54</sup> Cf. *Davidson v. Green*, 127 Fed. 999; *Hastorf v. Degnon*, 128 Fed. 982; *O'Brien v. Bags of Guano*, 48 Fed. 726; *The Reuben Dowd*, 9 Biss. 458; *Gillingham v. Charteston Co.*, 40 Fed. l. c. 650; *The Highland Light*, 88 Fed. 296.

dents are quite the same as are laid down with respect to crossbills in classical equity practice.<sup>55</sup>

The filing of a cross-libel is the initiation of a quasi-independent proceeding, with the same formalities as those attendant upon the filing of an original libel.<sup>56</sup> But substituted service upon the proctors of the original libellant is permitted.<sup>57</sup>

It is provided by Rule 53, that the respondents in a cross-libel must give security to respond in the usual form and amount, unless the Court for good cause should otherwise direct; and all proceedings upon the original libel are to be stayed until such security shall be given.<sup>58</sup>

§ 11. **Rule 59—Bringing in Additional Parties.**—Somewhat related to the subject of cross-libel is the right conferred in collision cases to bring in additional defendants. It is, in effect, provided by Rule 59, that in any suit for damage by collision (whether *in rem* or *in personam*) any defendant, at or before the time of filing his answer (or within such further time as is granted for that purpose) may show to the Court, by verified petition, that some other vessel or party was guilty of fault or negligence which contributed to the collision; setting forth the particulars in suitable allegations, and praying that such other vessel or party be brought in as a party defendant, by the issuance and service of process, with the same effect as if originally joined. The other parties in the suit thereupon may answer such petition; and such new parties, or the claimant of any vessel, if brought in, must answer the original libel, and give stipulation in like manner as an original respondent or claimant. The Court will render such a decree upon the whole matter, as to all the parties before it, as justice may require. Every petitioner, under this rule,

<sup>55</sup> *Bowker v. United States*, 186 U. S. 135; *The Dove*, 91 U. S. 381; *The Venezuela*, 173 Fed. 834; *Vianello v. Credit Lyonnais*, 15 Fed. 637; *The Electron*, 48 Fed. 689.

<sup>56</sup> Cf. *Ward v. Chamberlain*, 21 How. 572.

<sup>57</sup> *The Eliza Lines*, 61 Fed. 308.

<sup>58</sup> *Vianello v. Credit Lyonnais*, 15 Fed. 637.



## § 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

must give a stipulation, with sureties, conditioned to pay to the libellant, and to any claimant or defendant so brought in, all such costs, damages and expenses as may be awarded against the petitioner upon final decree.<sup>59</sup>

The history of this rule is given in the case of *ex parte* New York, Etc., Steamship Co.;<sup>60</sup> and other instances of its application might be cited.<sup>61</sup>

The practice laid down by this rule has been held, by a sort of equitable extension, to apply to other than cases of collision, so as to avoid a multiplicity of suits by bringing in additional defendants who may be really liable for a demand or some portion thereof.<sup>62</sup>

**§ 12. No Replication Necessary—Amendments of Libel to Confess and Avoid.**—Under the present admiralty practice, the pleadings usually end with the answer. No replication, general or special, can be filed unless allowed by the Court for good cause shown. New facts set up in the answer are considered as denied by the libellant; but he *may*, within the period allotted by the Court, amend his libel so as to confess and avoid, or explain and add to, the new matter in the answer; and the defendant, within the time allowed him, may answer such amendments.<sup>63</sup>

Additional interrogatories may be appended at the foot of a libel so amended or the answer thereto, covering the additional averments.<sup>64</sup>

**§ 13. Amended and Supplemental Pleadings.**—Taking up the question of amendments, the rules provide that amend-

<sup>59</sup> Rule 59.

<sup>60</sup> 155 U. S. 523.

<sup>61</sup> Cf. *The Beaconsfield*, 158 U. S. 303; *The Barnstable*, 181 U. S. 464.

<sup>62</sup> *Dalley v. New York*, 119 Fed. 1005; *The K. No. 1*, 150 Fed. 111; *Evans v. New York, Etc., Co.*, 163 Fed. 405.

<sup>63</sup> Rule 51; Cf. *The Mexican Prince*, 70 Fed. 246; *Coffey v. U. S.*, 116 U. S. 427.

<sup>64</sup> Cf. *The Edwin Baxter*, 32 Fed. 296.

ments in matters of form may be made at any time, on motion to the Court, as of course. Amendments in matters of substance may be made at any time before the final decree, in the discretion of, and upon the terms imposed by, the Court.<sup>65</sup>

In general, it may be said that the Court exercises an equitable liberality in allowing amendments, where such a course would not be productive of substantial prejudice to the adverse party.<sup>66</sup> If supplemental pleadings have any practical existence in the admiralty courts of this country, they fulfil, I suppose, a function analogous to supplemental proceedings in chancery. They are very rare in the reports.<sup>67</sup>

**§ 14. The Trial—Provisions for Jury—Commissioners.—**The historical method of trial is before the Court and without a jury. Section 566 of the Revised Statutes provides for trial by jury, when required by either party, in causes of admiralty and maritime jurisdiction, “relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons’ burthen or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation *between places in different states and territories upon the lakes and navigable waters connecting the lakes.*”

This provision was a remnant of the Act of 1845, extending the admiralty jurisdiction over the great lakes.<sup>68</sup> The discriminatory policy of the act has been criticised by able judges,<sup>69</sup> who have manifested a disposition to treat the ver-

<sup>65</sup> Rule 24; *Steamboat Morgan v. Kouns*, 115 U. S. 69; *The Corozal*, 19 Fed. 655.

<sup>66</sup> *The Monte A.*, 12 Fed. 331; *Davis v. Adams*, 102 Fed. 520; *The San Rafael*, 141 Fed. 270; *The Minnetonka*, 146 Fed. 509; *Vogeman v. Raeburn*, 180 Fed. 97; Cf., however, *The Thomas Melville*, 31 Fed. 486; *O’Brien v. Miller*, 168 U. S. 287; *The Wildenfels*, 161 Fed. 864; *The Ask*, 156 Fed. 678; *The Bencliff*, 161 Fed. 909; *The Burma*, 187 Fed. 94.

<sup>67</sup> Cf. *Waring v. Clarke*, 5 How. 1. c. 447.

<sup>68</sup> 5 Stat. 726; *The Eagle*, 8 Wall. 15.

<sup>69</sup> *The Empire*, 19 Fed. 558.

§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

dict as advisory.<sup>70</sup> The statute has no reference to foreign vessels or those plying between ports of the same state.<sup>71</sup>

There is another statute, enacted in 1875,<sup>72</sup> which enabled the parties to an admiralty suit pending in the *Circuit* Court to try matters of fact by a jury of not less than five nor more than twelve, under the direction of the court, as at common law; but it must be by *consent* of the parties. It is a matter of grave doubt whether this statute, under the present appellate system, has any operative effect. I do not think it has.<sup>73</sup>

Under the provisions of Rule 44, the Court may refer "any matters arising in the progress of the suit" to one or more commissioners, to hear the parties and make report thereon. Such commissioners are quite analogous to masters in chancery and exercise the powers customarily conferred upon the latter. Default cases are usually referred to them; and by consent of parties they may try the whole of any contested case, and report back, with the evidence, their conclusions of law and fact.<sup>74</sup>

Exceptions of the same general character as in equity should be filed to their report; and unless the local rule fixes a different time, or some special order is made, I assume they should be filed within the same time.<sup>75</sup> Our local rules<sup>75a</sup> provide that all proofs in admiralty causes in the District Court shall be by deposition or commission; but the rule is a dead letter, and is practically never observed, particularly since the new Equity Rules.

Customarily the cause is heard, in this district, *viva voce* by

<sup>70</sup> *Ibid.*; *The City of Toledo*, 73 Fed. 220; but see *The Western States*, 159 Fed. 354.

<sup>71</sup> *The Western States*, 159 Fed. 354; *The Erie Belde*, 20 Fed. 63; *The City of Toledo*, 73 Fed. 220.

<sup>72</sup> 18 Stat. 315.

<sup>73</sup> *The Nyack*, 199 Fed. 383; *Munson Line v. Miramar, Etc., Co.*, 167 Fed. 960; *The Philadelphian*, 60 Fed. 423; Cf. Sec. 16, *infra*.

<sup>74</sup> *The Elton*, 83 Fed. 519.

<sup>75</sup> Rule 44; Cf. *The Cayuga*, 59 Fed. 483.

<sup>75a</sup> Local Rule 36.

the Court, just as an equity case; but depositions may be taken as in cases at law.

§ 15. **Appeals.**—The ordinary remedy for an adverse decision is an appeal.<sup>76</sup> That appeal must be taken either to the Supreme Court or to the Circuit Court of Appeals. The rules for determining to which of these courts the appeal is properly returnable, are in no wise different from the rules governing any suit in equity or at law; and the *quality* of the questions which are involved, or upon which the jurisdiction of the District Court is founded, is determinative; as we shall hereafter see, in discussing appellate jurisdiction at law and in equity.<sup>77</sup>

What is the extent of the review? This raises a very serious question.

Prior to the Court of Appeals Act in 1891, an appeal lay from the District to the Circuit Court, which operated very much like an appeal from a Justice of the Peace to our Circuit Court. The appeal vacated the judgment of the District Court completely as to both parties, the trial and proceedings were *de novo*, the cause was never remanded, and the Circuit Court entered its own decree and carried it into execution.<sup>78</sup>

Where the then jurisdictional amount was involved, a further appeal lay from the Circuit Court to the Supreme Court.

Now, when the case reached the Supreme Court, the latter tribunal found itself confronted by a statute passed to facilitate (by a sort of procrustean method) the disposition of its congested docket, so far as appeals in admiralty cases were concerned. That statute<sup>79</sup> required the Circuit Court to find and state separately its conclusions of fact and conclusions of law (as well as making provision for trying the facts by

<sup>76</sup> *The Baltimore*, 8 Wall. 377.

<sup>77</sup> Cf. *Oregon Ry. Co. v. Balfour*, 179 U. S. 55; *Simmons v. The Jefferson*, 215 U. S. 130; *Lehigh Valley R. R. Co. v. Steamboat Co.*, 218 U. S. 264; *Cleveland, Etc., R. R. Co. v. Steamship Co.*, 208 U. S. 316.

<sup>78</sup> *The Steamboat Louisville*, 154 U. S. 657; *The Hesper*, 122 U. S. 256; *The Lucille*, 19 Wall. 73.

<sup>79</sup> 18 Stat. 315.

§ 16 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

jury of five to twelve persons, upon consent of the parties); and further declared that the review of the Supreme Court, upon appeal, should be limited to a determination of the questions of law presented by the record, and to such rulings as might be preserved by a bill of exceptions, prepared as in actions at law.

Under this statute, it was held that the facts found by the court (or by the jury provided for) had the same force and effect as the special verdict of a jury; and that only questions of law, apparent upon the record or preserved by the bill, were reviewable.<sup>80</sup> This statute has never been expressly repealed.

Prior to its enactment, that is to say, from 1803 to 1875, the Supreme Court, in an admiralty appeal (except perhaps in cases affected by R. S. 566), was under the same duty to review the facts as the law;<sup>81</sup> and new evidence, not omitted through lack of diligence below, was permitted to be taken and heard.<sup>82</sup>

§ 16. **Appeals—Hearing de Novo.**—In this situation the Court of Appeals Act was passed, the fourth section of which abolished all the appellate jurisdiction of the Circuit Court, and distributed appeals between the Supreme Court and the Courts of Appeals. This left the District Courts with sole admiralty jurisdiction, and they were not bound by the statute of 1875, as originally enacted. The ordinary appellate jurisdiction of the Supreme Court over instance causes of admiralty and maritime jurisdiction, as merely such, was taken away; so that thereafter no admiralty case could be directly appealed to the Supreme Court, unless it involved (as rarely happened) a constitutional question, or such other question as, under the new scheme of jurisdiction, would carry any cause, at law, equity, or admiralty, to the supreme trib-

<sup>80</sup> *The City of New York*, 147 U. S. 72; *The Gazelle*, 128 U. S. 474; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485; *The Benefactor*, 102 U. S. 214; *The Abbotsford*, 98 U. S. 440.

<sup>81</sup> *The Baltimore*, 8 Wall. 377; *The Lady Pike*, 21 Wall. 1.

<sup>82</sup> *Wells v. U. S.*, 7 Cranch. 22; *The Mabey*, 10 Wall. 419; *The Lady Pike*, 21 Wall. 1.

unal. The Courts of Appeals were not mentioned or referred to in the act of 1875, since they were created long after.

Without descending further into details, the question arose (and it was one worthy of serious doubt) whether that act, under certain general clauses of the act of 1891, did not still apply to the Supreme Court, and the Courts of Appeals, so as to deprive them of any power to review questions of fact.

Without undertaking to cite or review all the decisions, it seems to me the greater weight of authority justifies the statement, that the act of 1875 is repealed by implication; that an appeal in admiralty is heard, both in the Supreme Court and in the Court of Appeals (notwithstanding even R. S. 566), on the facts as well as the law, with the right to admit new evidence; and that the appeal vacates the decree below.<sup>83</sup>

§ 17. **Proceedings for Appeal.**—The appeal should be applied for and allowed.<sup>84</sup> Technically, I can see no reason why a petition for appeal should not be filed, under Rule 35 of the Supreme Court, and Rule 11 of the Circuit Courts of Appeals, somewhat of the same sort as filed on an equity appeal.

According to a number of cases, an assignment of errors should be filed therewith.<sup>85</sup> The citation should be signed, served upon the adverse party, bond given, and a certified copy of the transcript filed with the clerk of the proper appellate court, within the time required by its rules.

Admiralty Rule 52 prescribes the form of making up the transcript. The limitation for appeal would seem to be the usual six months to the Court of Appeals; and I assume it to be now three months in the Supreme Court.<sup>86</sup>

<sup>83</sup> *Reid v. Am. Express Co.*, 241 U. S. 544; *The San Rafael*, 141 Fed. 270; *Munson v. Miramor S. S. Co.*, 167 Fed. 960; *The A. G. Brower*, 220 Fed. 648; *The Nyack*, 199 Fed. 383; *City of Cleveland v. Chisholm*, 90 Fed. 431.

<sup>84</sup> *Steamer Zephyr v. Brown*, 2 Wash. Ter. l. c. 46; *Braithwaite v. Jordan*, 5 N. D. 196; Cf. *The New England*, 3 Sumn. 495.

<sup>85</sup> Rule 35, S. C.; Rule 11, C. C. A.; *Chicago Ins. Co. v. Graham, Etc., Co.*, 108 Fed. 271; *Cook v. Smith*, 187 Fed. 538; *Cory v. Penco*, 76 Fed. 997; Cf. *The Wyandotte*, 145 Fed. 321.

<sup>86</sup> Cf. *The City of Naples*, 69 Fed. 794; *The New York*, 104 Fed. 561; *Robins, Etc., Co. v. Chesbrough*, 216 Fed. 121.

## CHAPTER XIX.

### THE COURTS OF APPELLATE JURISDICTION.

- § 1. Two Appellate Courts—The Statutes.
2. The Supervisory Control of the Supreme Court Over Courts of Appeals.
  3. "Where Jurisdiction Is in Issue."
  4. The Same—Final Judgments Only—Two Appeals.
  5. Jurisdiction in Issue—Respective Jurisdiction of the Appellate Courts.
  6. Necessity of Certificate.
  7. Constitutional Questions.
  8. The "Controlling" Doctrine.
  9. The Doctrine That An Appellant Cannot Allege Error in His Own Favor.
  10. The Constitutional Question Must be Real.
  11. Constitutional Question Gives Complete Jurisdiction—No Amount Necessary.
  12. When Judgments of C. C. A. Final.
  13. Appeal to Supreme Court Under Special Statutes.
  14. Certiorari to C. C. A. by the Supreme Court.
  15. Criminal Cases.

§ 1. **Two Appellate Courts—The Statutes.**—Given an adverse judgment in the District Court, in law, equity or admiralty, a review must be sought, by appropriate methods, either in the Circuit Court of Appeals or in the Supreme Court. They divide between them the universe of appellate jurisdiction; and the division is effected almost solely according to the character of the questions involved.

There are two important statutes: Sections 238 and 128 of the Judicial Code.

Section 238 provides, in effect, that appeals and writs of error may be taken directly from the District to the Supreme Court in the following cases: (1) In any case in which the jurisdiction of the court is in issue, in which event the question of jurisdiction alone shall be certified to the Supreme Court for decision; (2) from final sentences and decrees in prize causes; (3) in any case that involves the construction

or application of the federal constitution; (4) in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question, and (5) in any case in which the constitution or law of a state is claimed to be in contravention of the federal constitution.

On the other hand, Section 128 provides, in part, that "the Circuit Courts of Appeals shall exercise appellate jurisdiction to review, by writ of error or appeal, final decisions in the District Courts . . . in all cases other than those in which appeals or writs of error may be taken direct to the Supreme Court, as provided in Section 238, unless otherwise provided by law; . . ."

If the foregoing constituted the complete statutory scheme, it would appear simple indeed; but no such simplicity of purpose has any charm for modern lawmakers. They therefore proceeded to add the remainder of Section 128, reading as follows: "And (except as provided in Sections 239 and 240) the judgments and decrees of the Circuit Courts of Appeals shall be *final* in all cases: (a) In which the *jurisdiction* is dependent *entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also, in all cases arising (b) under the patent laws, (c) under the trade-mark laws, (d) under the copyright laws, (e) under the revenue laws, (f) under the criminal laws, and (g) *in admiralty cases*."

Now this immediately raises a difficulty. A case may occur, wherein the jurisdiction of the District Court was dependent, at the beginning of that jurisdiction, *entirely* upon (i. e., the case *arose* under) some one of the matters just specified; and, in every such case, the decision of the Court of Appeals is declared by the statute to be final. Suppose, however, that there is imported into such a case, by answer, plea or otherwise, a constitutional question, or some one of the other questions mentioned in Section 238. This subsequent importation does not change the character of the case as originally dependent upon, or arising under, the revenue laws or di-



verse citizenship; yet the case, as a whole, involves, for example, a constitutional question of the sort that would confer jurisdiction upon the Supreme Court under Section 238. To which court shall it go? The Court of Appeals ought to have jurisdiction; for the case (arising under the revenue laws or under diverse citizenship) belongs to a class over which the judgment of the Court of Appeals is to be final; and if their judgment in such a case is to be final, they certainly have a right to adjudicate—to render that judgment. The Supreme Court ought to have jurisdiction; because the case involves the construction of the federal constitution.

§ 2. **The Supervisory Control of the Supreme Court Over Courts of Appeals.**—Before undertaking to resolve this situation, it will be prudent to complete our survey of the statutory scheme. The Supreme Court is given a supervisory control over the Courts of Appeals, exercisable in three ways:

(a) By Section 239 of the Judicial Code it is provided as follows: “In any case within its appellate jurisdiction, as defined in Section 128, the Circuit Court of Appeals at any time may *certify* to the Supreme Court . . . *any questions or propositions of law* concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may *either* give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, *or* it may require that the *whole record and cause* be sent up to it for its consideration, and thereupon shall decide the matter in controversy. . . .”

(b) By Section 240 of the Judicial Code, “in any case . . . in which the judgment or decree of the Circuit Court of Appeals is made final, it shall be competent for the Supreme Court to require, *by certiorari*, or otherwise, upon the petition of any party thereto, any such cause to be *certified* to the Supreme Court for its review and determination . . .”

(c) By Section 241 of the Judicial Code, “in any case in which the judgment or decree of the Circuit Court of Appeals is not made final . . ., there shall be of right an *appeal*

or *writ of error* to the Supreme Court . . . where the matter in controversy shall exceed one thousand dollars, besides costs.”

§ 3. “**Where Jurisdiction is in Issue.**”—Over such a narrow, statutory arena, an astonishing number of legal battles have been fought.

Confining ourselves, for the present, to civil causes, let us take up that clause of Section 238 which provides for an appeal or writ of error direct from the District to the Supreme Court, “in any case in which the jurisdiction of the court is in issue.”

The Supreme Court has often declared that this language is intended to give a review of the jurisdiction of the lower court, *as a federal court*, and not of the jurisdiction upon general grounds of law or procedure applicable as well to state as to federal tribunals.<sup>1</sup> A clearer statement of the rule is laid down by Justice Vandevanter, in a recent case: “The jurisdiction of . . . a District Court is in issue whenever the *power* of the court to hear and determine the cause, *as defined and limited by the Constitution or statutes of the United States*, is in controversy.”<sup>2</sup>

The following, among many others, have been held to be questions involving the jurisdiction of the court and justifying a direct appeal or writ of error: Whether the person of the defendant has been brought under the dominion of the court by proper service of process;<sup>3</sup> whether the Court erred in dismissing an attachment proceeding upon the grounds, that no service was had upon the defendant, that a particular appearance was not general, and that the property seized was

<sup>1</sup> *Bogart v. Southern Pac. Co.*, 228 U. S. 1. c. 144; *Fore River, Etc., Co. v. Bagg*, 219 U. S. 175.

<sup>2</sup> *U. S. v. Congress Construction Co.*, 222 U. S. 1. c. 201.

<sup>3</sup> *Shepard v. Adams*, 168 U. S. 618; *Remington v. Cent. Pac. Ry. Co.*, 198 U. S. 477; *Board of Trade v. Hammond*, 198 U. S. 424; *Commercial Ins. Co. v. Davis*, 213 U. S. 245; *Mechanical, Etc., Co. v. Castleman*, 215 U. S. 437; *Herndon-Carter Co. v. Morris*, 224 U. S. 496.

### § 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

not subject to attachment;<sup>4</sup> whether or not the suit has been brought, as against proper objection, in the wrong district;<sup>5</sup> whether or not, upon proper alignment, there exists the requisite diversity of citizenship;<sup>6</sup> whether or not the jurisdictional amount is involved in the controversy;<sup>7</sup> whether or not a suit could be maintained in the federal courts, under the commerce act, for damages caused by illegal allowances, without any precedent action of the Interstate Commerce Commission;<sup>8</sup> whether or not a case arose under the patent or copyright laws, so as to fall within the federal jurisdiction.<sup>9</sup>

On the other hand, the following have been held *not* to involve federal jurisdiction, *as such*: Whether the court below erred in dismissing an equity suit because there was a plain, adequate and complete remedy at law;<sup>10</sup> whether or not a federal court, under the rule of comity, will undertake to administer a trust estate after a suit with reference thereto has been begun in a state court;<sup>11</sup> whether a cause of action arising under a state statute is penal in its nature;<sup>12</sup> where the question involved was as to the court's power as a court of equity, or of its general power as a judicial tribunal;<sup>13</sup> and whether a party who cannot be served is so indispensable as to prevent a court of equity from adjudicating the controversy.<sup>14</sup>

<sup>4</sup> Davis v. Cleveland, Etc., Co., 217 U. S. 157.

<sup>5</sup> Davidson Marble Co. v. U. S., 213 U. S. 10; U. S. v. Congress Construction Co., 222 U. S. 199.

<sup>6</sup> Venner v. Great Northern Ry. Co., 209 U. S. 24; Mexican Central Ry. Co. v. Eckman, 187 U. S. 429.

<sup>7</sup> Wetmore v. Rymer, 169 U. S. 115; Globe, Etc., Co. v. Landa Oil Co., 190 U. S. 540; Smithers v. Smith, 204 U. S. 632; Schunk v. Moline Co., 147 U. S. 500; U. S. v. Sayword, 160 U. S. 493.

<sup>8</sup> Mitchell Coal Co. v. Penn. Ry. Co., 230 U. S. 247; Cf. Darnell v. Ill. Cent. Ry. Co., 225 U. S. 243.

<sup>9</sup> The Fair v. Kohler Die Co., 228 U. S. 22.

<sup>10</sup> Smith v. McKay, 161 U. S. 355; Blythe v. Hinckley, 173 U. S. 501.

<sup>11</sup> Louisville Trust Co. v. Knott, 191 U. S. 225.

<sup>12</sup> Fore River, Etc., Co. v. Hagg, 219 U. S. 175.

<sup>13</sup> Bien v. Robinson, 208 U. S. 423.

<sup>14</sup> Bogart v. Southern Pac. Co., 228 U. S. 137.

The general line of demarcation is plain; but cases arise which are hard to distinguish.

§ 4. **The Same—Final Judgments Only—Two Appeals.**—Proceeding further to clear the ground, the jurisdiction must have been “in issue.” By this I understand to be required that the question as to the jurisdiction of the lower court must have been raised upon the record, by some appropriate and timely motion, objection or pleading.<sup>15</sup>

It was not intended to do away with the ordinary rule, that, in the absence of clear provision to the contrary, no appeal or writ of error will lie until final judgment; so that an appeal or writ of error cannot be immediately sued out upon the decision of the question of jurisdiction, but must await the termination of the cause by final judgment or decree.<sup>15a</sup>

Neither was it intended to permit the same party to maintain at the same time two appeals or writs of error to different appellate courts and obtain their respective opinions, upon the whole or upon different fragments of the same case.<sup>16</sup>

§ 5. **Jurisdiction in Issue—Respective Jurisdiction of the Appellate Courts.**—Assuming now that a question of jurisdiction is involved, and that none of the other questions contained in section 238 of the Judicial Code are present, the following situations may be conceived to arise:

A. The defendant puts the jurisdiction in issue, and

(1) The objection is sustained, disposing of the case; in which event the plaintiff should have the question certified,

<sup>15</sup> *Maynard v. Hecht*, 151 U. S. l. c. 325; *Carey v. Houston, Etc., Ry. Co.*, 150 U. S. l. c. 179; Cf. *Nichols v. Franson*, 203 U. S. 278.

<sup>15a</sup> *McLish v. Roff*, 141 U. S. 661; *Bowker v. U. S.*, 186 U. S. l. c. 138; *Heike v. U. S.*, 217 U. S. l. c. 428; *Bardes v. First Nat. Bank*, 175 U. S. 526.

<sup>16</sup> *McLish v. Roff*, 141 U. S. 661; *Maynard v. Hecht*, 151 U. S. 326; *U. S. v. Jahn*, 155 U. S. l. c. 113; *Robinson v. Caldwell*, 165 U. S. 359; *Union, Etc., Bank v. Memphis*, 189 U. S. 71; *Columbus, Etc., Co. v. Crane*, 174 U. S. 600.

and take his appeal or writ of error to the Supreme Court, which alone has jurisdiction.<sup>17</sup>

(2) The objection is overruled, but judgment on the merits is rendered in favor of the defendant; in which event the plaintiff (who has successfully maintained the jurisdiction) must take the case by appeal or writ of error to the Circuit Court of Appeals. The latter court may, if it deems proper, certify the question of jurisdiction to the Supreme Court.<sup>18</sup>

(3) The objection is overruled, and judgment is rendered for the plaintiff in a sum satisfactory to him; in which event the defendant (who has objected to the jurisdiction) may elect to carry, upon proper certificate, the jurisdictional question alone to the Supreme Court, *or* to take the whole case to the Circuit Court of Appeals, which may certify, if it desire, to the Supreme Court the question of jurisdiction.<sup>19</sup>

(4) The objection is overruled, and judgment rendered for plaintiff in a sum unsatisfactory to him; in which event the plaintiff (who has successfully maintained the jurisdiction) takes the case on the merits to the Circuit Court of Appeals.<sup>20</sup>

(5) The objection is overruled, and judgment rendered for the plaintiff in a sum unsatisfactory to both plaintiff and defendant; in which event, the defendant may elect (a) to go to the Supreme Court on jurisdiction alone, or (b) to the Court of Appeals upon the whole case. In either of these contingencies, the plaintiff should take the case to the Court of Appeals, which will await the action of the Supreme Court

<sup>17</sup> U. S. v. Jahn, 155 U. S. 109; Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 1. c. 172; S. C. 156 Fed. 536; St. Louis, Etc., Co. v. American Cotton Co., 125 Fed. 196; Campbell v. Golden Cycle Co., 141 Fed. 610; Morrisdale Coal Co. v. Penn. Ry. Co., 183 Fed. 929.

<sup>18</sup> U. S. v. Jahn, 155 U. S. 109; Anglo-American, Etc., Co. v. Davis, 191 U. S. 376; Campbell v. Golden Cycle Milling Co., 141 Fed. 610.

<sup>19</sup> U. S. v. Jahn, 155 U. S. 109; *Re Lehigh Mining Co.*, 156 U. S. 1. c. 328; Mexican Central Ry. Co. v. Eckman, 187 U. S. 429; Weber v. Grand Lodge, 171 Fed. 839; Wirgman v. Persons, 126 Fed. 449.

<sup>20</sup> U. S. v. Jahn, 155 U. S. 109.

upon the jurisdictional question, if any has been carried to that tribunal.<sup>21</sup>

B. The plaintiff objects to the jurisdiction, being dissatisfied with its results; in which case similar rules, so far as applicable, would apply.<sup>22</sup>

In every case, where the complaining party (whether plaintiff or defendant) has an option to go to the Court of Appeals, that court has *power* to decide questions of jurisdiction as well as the merits of the case.<sup>23</sup>

§ 6. **Necessity of Certificate.**—Where the question of jurisdiction is alone the ground for review, the statute requires that it be *certified* to the Supreme Court.<sup>24</sup> This requirement was intended to confine the labor of the court, and to do away with any necessity for wading through the remainder of the case.<sup>25</sup> A distinct and formal certificate is not always necessary; the rule stopping with the reason therefor. Thus where the petition for appeal relies only upon a wrongful assumption of jurisdiction, and the Court expressly allows the appeal solely on the question of jurisdiction, reserving the right to designate and determine what portions of the record should be sent up to present the question, that is enough. No sacrosanctity is to be attached to the words “certify” or “certificate;” but there must be something more than a mere *suggestion* that the jurisdiction was in issue. The record must show affirmatively that the lower court sends up for consideration a single, definite question of jurisdiction, and the precise question should be clearly and separately stated.<sup>26</sup>

Where the sole question decided by the judgment was one of jurisdiction, and the record entry of judgment recited a

<sup>21</sup> U. S. v. Jahn, 155 U. S. 109.

<sup>22</sup> U. S. v. Jahn, 155 U. S. 109.

<sup>23</sup> U. S. v. Jahn, 155 U. S. 109.

<sup>24</sup> Maynard v. Hecht, 151 U. S. 324; Colvin v. Jacksonville, 157 U. S. 368.

<sup>25</sup> *Re Lehigh Mining & Mfg. Co.*, 156 U. S. 322; *Von Wagenen v. Sewall*, 160 U. S. 369.

<sup>26</sup> *Shields v. Coleman*, 157 U. S. 168.

dismissal for lack of jurisdiction, and the bill of exceptions contained a similar recital, and the order allowing the writ of error declared that it was allowed upon the question of jurisdiction; there could be no ambiguity, and no other or more formal certificate was necessary.<sup>27</sup>

In another case the Court said that it must appear *either* that the question of jurisdiction was certified to the Supreme Court, *or* that the decree appealed from showed on its face that the sole question decided was one of jurisdiction. In that case, jurisdiction was asserted under the patent laws, but the lower court dismissed the bill, in terms, "for want of jurisdiction," and in the order allowing the appeal stated that the allowance was from a final decree, dismissing the cause for want of jurisdiction. Nothing more was held necessary.<sup>28</sup>

It is not always indispensable that the certificate set forth the precise species or detail of the jurisdictional question, as lack of diversity, insufficiency of amount, or otherwise. It would seem to be enough that the testimony bearing on the question of jurisdiction be abstracted into a bill of exceptions, and the opinion of the Court on that question be sent up with the record.<sup>29</sup>

Additional cases illustrating the dispensability of a certificate under particular but analogous circumstances, are referred to below.<sup>30</sup> It is imperative that any certificate, to be effective, should be granted during the term at which the judgment or decree is rendered.<sup>31</sup>

Where the case involves some other of the questions specified in Section 238 of the Judicial Code, as for example a con-

<sup>27</sup> *Re Lehigh Mining & Mfg. Co.*, 156 U. S. 322.

<sup>28</sup> *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282.

<sup>29</sup> *Chicago v. Mills*, 204 U. S. 321; *Cf. The Bayonne*, 159 U. S. 687.

<sup>30</sup> *Interior Construction Co. v. Gibney*, 160 U. S. 217; *Huntington v. Laidley*, 176 U. S. 668; *The Jefferson*, 215 U. S. 130; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437; *Herndon-Carter Co. v. Norris*, 224 U. S. 496; *The Fair v. Kohler*, 228 U. S. 22.

<sup>31</sup> *Colvin v. Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687; *Herndon-Carter Co. v. Norris*, 224 U. S. 496.

stitutional question, the matter stands upon a different basis. The case may be taken as of right to the Supreme Court; and that court, having acquired jurisdiction, has the power and is under the duty to dispose of the entire case, question of jurisdiction as well as merits. In such a state of affairs, no question of jurisdiction need be separately certified.<sup>32</sup>

§ 7. **Constitutional Questions.**—The next clause of section 238 of the Judicial Code relates to appeals in prize causes. This subject-matter was avoided in treating of admiralty, and we shall omit it here.

This brings us to the examination of appeals and writs of error “in any case that involves the construction or application of the Constitution.”

Assuming that there is a *real* involution of a constitutional question (concerning which more will be said hereafter) the following situations may be conceived, in each of which the word “*arises*” has reference to the jurisdiction of the lower court:

(1) The case *arises*, from a jurisdictional standpoint, solely under the constitution.

(2) The case *arises* both under the constitution and some other ground of federal justiciability, of such a character that if it stood alone, the Supreme Court would have exclusive jurisdiction.

(3) The case *arises* both under the constitution and under some other ground of federal justiciability, of such a character that if the case rested solely upon it, the Court of Appeals would have exclusive jurisdiction.

(4) The case *arises* under some ground of federal justiciability, of such a character that if it stood alone, the Court of Appeals would have exclusive jurisdiction in the first instance; but *after* the opening pleading, a constitutional question is injected into the case.

<sup>32</sup> Chappell v. U. S., 160 U. S. 1. c. 509; R. R. Commission v. L. & N. R. R. Co., 225 U. S. 1. c. 279.



In the first case above supposed, it is abundantly settled that the Supreme Court has exclusive jurisdiction.<sup>33</sup>

If there be any cases falling under the second class, I have no doubt the same rule would apply; and that the appellate jurisdiction of the Supreme Court would be exclusive.

In the third class of cases the judgment complained of may be carried either to the Supreme Court or the Circuit Court of Appeals.<sup>34</sup>

In the fourth class of cases the case may be carried either to the Supreme Court or to the Circuit Court of Appeals.<sup>35</sup>

§ 8. The "Controlling" Doctrine.—In making the foregoing classification, I have been sorely troubled by certain cases, which lay down the rule that, to warrant a direct appeal to the Supreme Court on the ground of the involution of a constitutional question, such question must be involved as *controlling*.<sup>36</sup>

The phrase "controlling" suggests that the doctrine is brought over from the law respecting review of state judgments. I assume that it means that the result depends or may depend upon the determination of the constitutional question; in other words, *that the constitutional question is*

<sup>33</sup> *Spreckels Sugar Co. v. McClain*, 192 U. S. 1. c. 407; *Union & Planters Bank of Memphis*, 189 U. S. 71; *Huguley Mfg. Co. v. Galleton Cotton Mills*, 184 U. S. 1. c. 295; *American Sugar Co. v. New Orleans*, 181 U. S. 1. c. 281; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305.

<sup>34</sup> *Railroad Commission v. Worthington*, 225 U. S. 1. c. 104; *Spreckels Sugar Co. v. McClain*, 192 U. S. 1. c. 407; *Altman v. U. S.*, 224 U. S. 583; *Miss. River Commission v. Illinois Cent. Ry. Co.*, 203 U. S. 1. c. 341; *Field v. Barber Asphalt Co.*, 194 U. S. 1. c. 620.

<sup>35</sup> *McFadden v. U. S.*, 213 U. S. 288; *American Sugar Co. v. New Orleans*, 181 U. S. 1. c. 280; *Loeb v. Township*, 177 U. S. 477 1. c.; *Huguley Mfg. Co. v. Galleton Cotton Mills*, 184 U. S. 290; *Ayres v. Polsdorfer*, 187 U. S. 1. c. 590; *Moore-Mansfield Co. v. Electrical Co.*, 234 U. S. 1. c. 622.

<sup>36</sup> *Carey v. Houston, Etc., Ry. Co.*, 150 U. S. 170; *Empire State Co. v. Hanley*, 205 U. S. 225; *World's Columbian Exposition v. U. S.*, 56 Fed. 657; *Staffords v. King*, 90 Fed. 140 1. c.; *Guaranty Trust Co. v. Met. Street Ry.*, 171 Fed. 1014.

*or may be decisive, in the Appellate Court, of the validity of the judgment below.* It thus looks at the case from the standpoint of the questions necessarily to be considered by the Appellate Court, rather than from the standpoint of the lower court in assuming jurisdiction.

In one case the following language is used:

“The right to bring the case to this court from the district court by a direct appeal depended on the question whether the *decree* . . . necessarily and directly involved the construction or application of the Constitution of the United States.”<sup>37</sup>

If the foregoing quotation were adopted, however, as the true rule, we shall have difficulty, e. g., in disposing of cases like *Davis v. Los Angeles*;<sup>38</sup> where plaintiff filed a bill to enjoin the enforcement of certain ordinances, upon the ground of their unconstitutionality. A demurrer was filed, setting up the incapacity of a court of equity to restrain criminal proceedings; which demurrer the lower court sustained and dismissed the cause. The constitutional question was never passed upon below; yet the Supreme Court sustained its own jurisdiction.

If we must have *controlling*, as a qualification of the jurisdiction of the Supreme Court, I therefore prefer my own notion (which I have indicated above) as to its meaning.

Personally, I do not believe this necessity of *controlling* effect has any rightful application to Section 238 of the Judicial Code at all. I think it was originally borrowed from the rule applicable to state judgments, to help out a harsh case. If any reliance can be placed in general language, it is utterly opposed by cases like *Huguley Mfg. Co. v. Galetton Cotton Mills*, and the rest cited under the first clause of our preceding section.

It is always necessary that there should be a *real* constitutional question; but the rule as to *controlling* seems to be

<sup>37</sup> *Moore-Mansfield, Etc., Co. v. Electrical Co.*, 234 U. S. 1. c. 626; Cf. *Empire State Co. v. Hanley*, 205 U. S. 1. c. 232.

<sup>38</sup> 189 U. S. 207.

of wider reach. The Supreme Court ought to qualify or overrule some of the cases so as to make the matter plain.

§ 9. **The Doctrine that an Appellant Cannot Allege Error in His Own Favor.**—Akin to this *controlling* notion is that of the estoppel or quasi-estoppel of a party to complain that a constitutional question is involved, for purposes of appeal or error, when such question has been decided by the lower court in his favor.

In *Davis v. Anglo-American Provision Co.*,<sup>39</sup> the complainant set up the unconstitutionality of a state law as affecting certain property rights claimed by him. The lower court agreed with him that the state law was unconstitutional, but held that he did not have the property-rights asserted. Upon appeal to the Supreme Court, the latter dismissed the appeal as not being within its jurisdiction.<sup>40</sup>

In other words, if a plaintiff brings suit in a federal court, and the constitutional question is the original and sole basis of the jurisdiction below, and the lower court upholds the constitutional contention, but finds against the plaintiff upon some other ground, the Court of Appeals would have exclusive jurisdiction. This result is also squarely contrary to the rule heretofore laid down that the Court of Appeals has no jurisdiction where the jurisdiction of the lower court was founded solely upon the involution of a constitutional question.

If the *controlling* theory be sound, as requiring involution in the decree below, no doctrine of estoppel is ordinarily needed.

In my judgment, *Davis v. Anglo-American Provision Co.*, and the case or two seeming to quote it with approval should be authoritatively dealt with.

§ 10. **The Constitutional Question Must be Real.**—We have now to consider the *real* involution of a constitutional question, and what amounts to such.

In order that a case shall *involve* the construction or ap-

<sup>39</sup> 191 U. S. 376.

<sup>40</sup> Cf. *Empire State Co. v. Hanley*, 198 U. S. 292.

plication of the constitution, in the sense here meant, some title, right, privilege or immunity must be claimed *directly* under that instrument; and the record must show that a definite issue was raised before the lower court with respect to the possession of such right or immunity.<sup>41</sup>

There must be a real and substantial constitutional *question*. It is not enough that a fictitious claim is set up, without colorable support in reason and frivolous in its apparent lack of merit.<sup>42</sup>

In this connection, controlling authority supports the proposition, that what was once a real constitutional question may cease to be such, after it has been authoritatively settled and set at rest by the decisions of the Supreme Court; and in plain cases the rule is justified by other analogies.<sup>43</sup>

It is too late too *involve* a constitutional question by an assignment of errors, after the lower court has done with its judgment.<sup>44</sup>

While I do not understand that there is any rule in the federal courts to the effect that a constitutional question must be raised at the first available opportunity (such as we have in our state courts) I assume generally, that in order that such a question may be properly said to be involved, it should be

<sup>41</sup> *Ansbro v. U. S.*, 159 U. S. 695; *Muse v. Arlington Co.*, 168 U. S. 435; *C. H. & D. R. R. Co. v. Thiebaud*, 177 U. S. l. c. 619; *Itow v. U. S.*, 233 U. S. l. c. 584; *Arkansas v. Schlierholz*, 179 U. S. l. c. 601; *Carey v. Houston, Etc., Ry. Co.*, 150 U. S. 170; *Cornell v. Green*, 163 U. S. 75; *Paralso v. U. S.*, 207 U. S. l. c. 370.

<sup>42</sup> *Newburyport v. Newburyport Co.*, 193 U. S. 561; *O'Callaghan v. O'Brien*, 199 U. S. l. c. 100; *Bien v. Robinson*, 208 U. S. 423; *American Sugar Co. v. U. S.*, 211 U. S. 155; *Franklin v. U. S.*, 216 U. S. 559; *Goodrich v. Ferris*, 214 U. S. 71; *Budzisz v. Illinois Steel Co.*, 170 U. S. 1; *Apapas v. U. S.* 233 U. S. 587.

<sup>43</sup> *Harris v. Rosenberger*, 145 Fed. 449 and citation; *De Bearn v. Safe Deposit Co.*, 233 U. S. 24; *Fay v. Crozer*, 217 U. S. 455; *Rakes v. U. S.*, 212 U. S. 55; *Kaufman v. Smith*, 216 U. S. 610; *Hendricks v. U. S.*, 223 U. S. 178; *Hannis Distilling Co. v. Baltimore*, 216 U. S. l. c. 288.

<sup>44</sup> *C. H. & D. R. R. Co. v. Thiebaud*, 177 U. S. l. c. 619; *Cornell v. Green*, 163 U. S. 75; *Arkansas v. Schlierholz*, 179 U. S. l. c. 601.

presented in such time and manner as to require the court, in accordance with its general rules established on that subject, to notice and decide it. There would seem to be a tendency to treat certain cases as involving mere error, not necessarily and *directly* tested by the constitution as the norm. An erroneous direction of a verdict, excepted to upon the ground that such direction was contrary to the constitutional right of trial by jury, could hardly be relied upon as a basis for direct appeal.<sup>45</sup>

§ 11. **Constitutional Question Gives Complete Jurisdiction—No Amount Necessary.**—Where the Supreme Court acquires jurisdiction upon the ground of the involution of a constitutional question, it has jurisdiction over the entire case. This rule has no application to writs of error to state courts; and throughout this lecture we are speaking of appeals or writs of error from inferior federal courts.<sup>46</sup>

Where an appeal is taken by one party to the Supreme Court, upon the ground of a constitutional question, a cross-appeal lies to the same court, apparently regardless of its subject matter.<sup>47</sup>

It is further inferable from the language of certain cases, that so long as the constitutional question is *really* involved, it is immaterial whether it was raised by plaintiff or defendant, or whether the right or immunity asserted, was, in the lower court, upheld or denied;<sup>48</sup> and I need not call to your attention that this deduction is contrary to certain doctrines heretofore suggested and criticised.

The two remaining clauses of Section 238 of the Judicial Code provide for a direct appeal or writ of error in cases in-

<sup>45</sup> *Treat v. Standard Co.*, 157 U. S. 674; *Cf. Apapas v. U. S.*, 233 U. S. 1. c. 591.

<sup>46</sup> *Cf. Horner v. U. S.*, 143 U. S. 570; *Press Publishing Co. v. Monroe*, 164 U. S. 105; *Penn. Mutual Co. v. Austin*, 168 U. S. 1. c. 695; *Holder v. Aultman*, 169 U. S. 1. c. 89; *Loeb v. Columbia Township*, 179 U. S. 1. c. 481; *Field v. Barber Asphalt Co.*, 194 U. S. 1. c. 620.

<sup>47</sup> *Field v. Barber Asphalt Co.*, 194 U. S. 1. c. 620.

<sup>48</sup> *Holder v. Aultman*, 169 U. S. 81; *Loeb v. Columbia Township*, 179 U. S. 472; *Field v. Barber Asphalt Co.*, 194 U. S. 618.

volving the claimed unconstitutionality of federal or state laws, or the construction or validity of a treaty.

Of these clauses we shall not attempt a separate discussion. The principles applicable ought to be readily inferable from what has heretofore been said with respect to cases involving the construction or application of the constitution. All three of these clauses are usually grouped in treatment.

We may further note that, since the passage of the act creating the Circuit Court of Appeals in 1891, there is no pecuniary requirement for appellate jurisdiction of either the Supreme Court or the Circuit Court of Appeals over judgments of the District Courts.<sup>49</sup>

§ 12. **When Judgments of C. C. A. Final.**—In the cases specified in the latter part of Section 128 of the Judicial Code, the judgment of the Court of Appeals is final. In all other cases (save as otherwise specially provided) where the amount in dispute exceeds one thousand dollars, exclusive of costs, a writ of error or appeal lies, as of right, from the Court of Appeals to the Supreme Court.<sup>50</sup>

The judgments and decrees of the Court of Appeals which are made final, are tested and distinguished by the ground upon which the jurisdiction of the district court was *originally invoked*. If the bill or declaration *rested* upon some one or more of the grounds of jurisdiction specified in the latter part of Section 128, *and no other grounds*; then when the cause is carried to the Court of Appeals, the case stops there, in the absence of *certiorari* or *certification*.<sup>51</sup>

On the other hand, where the bill or declaration does not rest alone upon such grounds, but is founded also upon some other ground, as for example a federal or constitutional ques-

<sup>49</sup> *The Paquete Habana*, 175 U. S. 677.

<sup>50</sup> J. C., Sec. 241.

<sup>51</sup> *Ayres v. Pilsderfer*, 187 U. S. 585; *Press Publishing Co. v. Monroe*, 164 U. S. 105; *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397; *Bagley v. Fire Extinguisher Co.*, 212 U. S. 477; *McFadden v. U. S.*, 213 U. S. 288.

§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

tion, then (in the absence of special statute to the contrary) the judgment of the Court of Appeals may be carried to the Supreme Court, by error or appeal, if the requisite amount be in controversy.<sup>52</sup>

With the apparently impossible end in view of keeping the Supreme Court up with its docket, recent statutes have added to the foregoing rules. Cases arising under the bankruptcy law, the employers' liability acts, the hours of service acts, and the safety equipment laws, can no longer be carried to the Supreme Court under Section 241 of the Judicial Code, as I understand it, even though they involve, for example, a constitutional question.<sup>53</sup>

§ 13. **Appeal to Supreme Court Under Special Statutes.**—There certain *special* statutes which confer a right of appeal directly to the Supreme Court.

In so far as the District Court has succeeded to the jurisdiction of the Commerce Court, an appeal from a final judgment or decree lies to the Supreme Court.<sup>54</sup>

In any suits in equity against monopolies and combinations, brought by the United States, an appeal from the final decree lies only to the Supreme Court.<sup>55</sup>

There may be other cases, apart from interlocutory appeals from injunction proceedings against state laws or orders of the Interstate Commerce Commission, to which brief reference will be hereafter made.

§ 14. **Certiorari to C. C. A.**—The review by *certiorari* from the Supreme Court of a decision of the Circuit Court of Appeals is by no means a matter of course. The appendices of

<sup>52</sup> R. R. Commission v. Worthington, 225 U. S. 101; Standard Paint Co. v. Trinidad Co., 220 U. S. 446; Hennigsen v. U. S. Fidelity, Etc., Co., 208 U. S. 404; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397; U. S. v. American Bell, Etc., Co., 159 U. S. 548; Howard v. U. S., 184 U. S. 676.

<sup>53</sup> Act of Sept. 6, 1916; Cf. Central Trust Co. v. Lueders, 239 U. S. 11.

<sup>54</sup> Act of Oct. 22, 1913 (38 Stat. 220); J. C., Sec. 210.

<sup>55</sup> Act of Feb. 11, 1903 (32 Stat. 823).

the Supreme Court reports bristle with refused applications for *certiorari*.

The right to issue that writ is limited to cases where the decision of the Court of Appeals is *final*.<sup>56</sup>

The power is sparingly exercised; and will be ordinarily called into play only when the importance of the case, the necessity of harmonizing the various courts of appeals with each other, or with a state court, or some matter affecting the interests of the nation, demand it.<sup>57</sup>

It is not necessary that a decision shall have been rendered by the Court of Appeals. All that is required is that the cause should be pending therein.<sup>58</sup>

§ 15. **Criminal Cases.**—Taking up the subject of writs of error in *criminal* cases, it is a curious fact, in view of modern tendencies, that for a hundred years after the foundation of this government no statute authorized a criminal case to be brought to the Supreme Court, except upon a certificate of division of opinion. The history of the legislation is set forth, with his customary and solid learning, by Justice Gray in *U. S. v. Sanges*.<sup>59</sup> There are now three general statutory provisions conferring appellate jurisdiction in criminal cases; namely, Sections 128 and 238 of the Judicial Code and the act of March 2, 1907.<sup>60</sup> This last act provides that a writ of error may be taken by the *United States* direct to the Supreme Court (a) from a judgment or decision quashing, setting aside, or sustaining a demurrer to an *indictment* or any count thereof, when such decision is based upon the *invalidity* or the *construction* of the *statute* upon which the indictment is founded; (b) from a decision arresting a judgment of conviction for insufficiency of an *indictment*, where such deci-

<sup>56</sup> *Forsyth v. Hammond*, 166 U. S. 506; *U. S. v. Beatty*, 232 U. S. 463.

<sup>57</sup> *Forsyth v. Hammond*, 166 U. S. 506.

<sup>58</sup> *Ibid.*; *St. Louis, Etc., R. R. Co. v. Wabash R. R. Co.*, 217 U. S. 247.

<sup>59</sup> 144 U. S. 310; Cf. *Bessette v. Conkey Co.*, 194 U. S. 1. c. 335.

<sup>60</sup> Cf. 34 Stat. 1246.



sion is based upon the grounds just stated; and (c) from a decision sustaining a special plea in bar, where the defendant has not been put in jeopardy.

The time for suing out such a writ or error by the government is limited to thirty days after the decision complained of is rendered.

This act has been declared constitutional;<sup>61</sup> and I shall, without further discussion, refer you to several cases where its operation has been explained.<sup>62</sup> It was not repealed by the Judicial Code.<sup>63</sup>

Criminal cases are clearly included within Section 238 of the Judicial Code.<sup>64</sup>

Every criminal case arises under the criminal laws of the United States; and a constitutional or other similar question is necessarily imported after the original invocation of jurisdiction. Whenever a criminal case is carried to the Court of Appeals, its judgment would therefore seem to be final, and conclusive in the absence of *certiorari*.

Under the act of 1889, the Supreme Court had jurisdiction to review cases of capital conviction.<sup>65</sup>

It seems plain to me that this statute no longer has any operation; but I have found no decisions so holding.

<sup>61</sup> Taylor v. U. S., 207 U. S. 120; U. S. v. Bitty, 208 U. S. 393.

<sup>62</sup> U. S. v. Biggs, 211 U. S. 507; U. S. v. Mason, 213 U. S. 115; U. S. v. Celestine, 215 U. S. 278; U. S. v. Adams Express Co., 229 U. S. 381; U. S. v. Carter, 231 U. S. 492; U. S. v. Nixon, 235 U. S. 231.

<sup>63</sup> U. S. v. Winslow, 227 U. S. 202.

<sup>64</sup> Horner v. U. S., 143 U. S. 570; Motes v. U. S., 178 U. S. 458; Burton v. U. S., 196 U. S. 283; Williamson v. U. S., 207 U. S. 425; Apapas v. U. S., 233 U. S. 587; Brolan v. U. S., 236 U. S. 216; McFadden v. U. S., 213 U. S. 288.

<sup>65</sup> 25 Stat. 656.

## CHAPTER XX.

### APPEALS AND ERROR—DECISIONS REVIEWABLE.

- § 1. Appeal and Error—Distinction Practically Destroyed for Some Purposes.
- 2. Final Judgments—Definitions.
- 3. Severability of the Lis for Purposes of Review.
- 4. The Same.
- 5. The Same—Joint Claims.
- 6. The Same—Severability of Particular Matters.
- 7. Cross Bills—Petitions to Remove—Other Judgments Not Final.
- 8. Difficulty in Distinguishing Judicial and Ministerial.
- 9. Finality—Orders by Judge—Conception Below—Conditions.
- 10. Appellate Judgments.
- 11. Motions for Rehearing Defer Finality.
- 12. Appeals From Interlocutory Judgments.
- 13. The Same.

§ 1. **Appeal and Error—Distinction Practically Destroyed for Some Purposes.**—There is no constitutional right to more than one judicial determination of a cause.<sup>1</sup>

Whether there shall be any appellate review at all in a particular case, and the scope and incidents of that review, are alike within the discretion of Congress; and no court of the United States can exercise any appellate jurisdiction unless it be conferred by federal law.

There are two principal methods of review, both of which have come down to us from the English law; namely, the writ of error and the appeal. The former was the customary procedure by which a judgment at law was tested for error, and took up only questions of law. The latter was derived originally from the civil law, and was appropriate to equity and admiralty causes and other causes deemed to be of that nature; by means of which the facts as well as the law were subjected to scrutiny.

<sup>1</sup> Cf. *Baltimore, Etc., R. R. Co. v. Grant*, 98 U. S. 398.

## § 2 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Until very recently, these rules of applicability were very strictly applied in the federal courts; so that no case in equity or admiralty could be properly carried up by writ of error, nor any case at law by appeal.

The choice between error and appeal, while easy with respect to such actions as trover or ejectment, or a bill to enforce a trust, was in some cases very difficult.

A very late statute has declared, in effect, that no appellate court shall dismiss an appeal because a writ of error should have been sued out, nor any writ of error, where appeal was the proper remedy; but that the Court shall, in disregard of the misprision, nevertheless review the cause.<sup>2</sup>

This act leaves open some interesting questions as to how the Court can or will disregard the difference in the make-up of the record; and until this is settled, the old practice should be carefully adhered to.

I propose briefly to consider the subjects of Appeal and Error; but before doing so, it will be necessary to consider more narrowly what judgments and decrees are subject to review.

**§ 2. Final Judgments—Definitions.**—It is the general rule, subject to certain statutory exceptions which will be hereafter noted, that an appeal or writ of error will lie only from a *final* judgment or decree. The best interests of society demand that there should be an end to litigation; and it would be endless, if it were possible for either side to stop the proceedings and resort to a superior tribunal on every interlocutory ruling.

It must be confessed that it is difficult to define, incisively and comprehensively, this concept of finality. There is little discussion in the reports as to cases at law; which would indicate that the natural simplicity and integrality of the common law action ordinarily leaves room for no difficulty. The situation is far otherwise in equity.

<sup>2</sup> Act of Sept. 6, 1916.

Literally, the word *final* means putting an end to: to paraphrase an old saying—*quia finem ponit liti*. It is not, however, of the essence of a final judgment or decree that it should constitute a perpetual and conclusive bar to the relitigation of the controversy. It is enough that the particular suit is brought to an end; otherwise no judgment in ejectment could ever be the subject of a writ or error, nor any dismissal without prejudice be put to the test of an appeal.<sup>3</sup> The ordinary canon is, that a judgment or decree, to be final for purposes of appeal or error, must leave the case in such a condition that, in the event of affirmance in the Appellate Court, the lower court would have nothing to do but to *execute* the judgment or decree already entered.<sup>4</sup>

The form of expression is occasionally varied, as for example: "A judgment or decree, to be final . . . must terminate the litigation between the parties *upon the merits of the case*, so that if there should be an affirmance here, the court below would have nothing to do but to *execute* the judgment or decree it had already rendered."<sup>5</sup>

Sometimes we find it laid down that all *judicial* functions in the case must be completed; but that *ministerial* processes, necessary to realize and accomplish what has been adjudged, need not be awaited.<sup>6</sup>

As a purely mechanical test, I find it occasionally suggested, rather than stated, that a judgment or decree, to be final, should not leave for later determination any matters within

<sup>3</sup> Cf. *Weston v. Charleston*, 2 Pet. l. c. 464; *Holmes v. Jennison*, 14 Pet. l. c. 563; *Tyler v. Judges*, 179 U. S. l. c. 411; *Beasley v. Texas, Etc., R. R. Co.*, 191 U. S. 492; *Wecker v. Enameling Co.*, 204 U. S. 176.

<sup>4</sup> *National Bank v. Smith*, 156 U. S. 330; *Dainese v. Kendall*, 119 U. S. 53; *Lodge v. Twell*, 135 U. S. 232.

<sup>5</sup> *Bostwick v. Brinkerhoff*, 106 U. S. 3; *St. Louis, Etc., R. R. Co. v. Express Co.*, 108 U. S. 24; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429; *Kingman v. Western Mfg. Co.*, 170 U. S. 675; *McFarland v. Brown*, 187 U. S. l. c. 246; *Benjamin v. DuBois*, 118 U. S. 46.

<sup>6</sup> *Lodge v. Twell*, 135 U. S. 232; *McGourkey v. Toledo, Etc., R. R. Co.*, 146 U. S. 536.

the pleadings; and, conversely, a judgment or decree is final, which determines all matters within the pleadings.<sup>7</sup>

§ 3. **Severability of the *Lis* for Purposes of Review.**—The difficulty of accurately distinguishing, in a particular case, between *judgment* and *execution*, *judicial* and *ministerial* functions, in some of the preceding statements will have suggested itself to you; and none of the tests propounded will satisfactorily dispose of all the cases. There remain certain instances, which seem to me to involve the inquiry, whether the cause is to be regarded, in all its various steps and incidents as integral and entire—all such steps and incidents being considered, for purposes of appeal, as appendages of an inseparable whole; or whether it is to be regarded, under particular circumstances, as a congeries of judicial proceedings, some of which have a separate and independent termination for purposes of an appeal; such severability sometimes being inherent by diversity and independence of structure, and sometimes being artificially imported by method of judicial treatment.

Fundamentally, it seems to me the question is, what shall be regarded as the *lis* or controversy? A decree, to be final, need not always be the final or last of all the decrees that have been or could be entered in the course of a judicial proceeding.

As instances of inherent severability and independence of structure the cases in intervention may be referred to.

Thus in *Gumbel v. Pitkin*,<sup>7a</sup> a creditor claiming under a prior seizure was permitted to file an intervening petition in an attachment suit. The petition was dismissed and he sued out a writ of error. The Supreme Court held that the order of dismissal disposed of his rights, and was a final judgment as to that issue.

<sup>7</sup> Cf. *Craighead v. Wilson*, 18 How. 199; *McGourkey v. Toledo, Etc., R. R. Co.*, 146 U. S. 536; *Winthrop v. Meeker*, 109 U. S. 180; *Covington v. Bank*, 185 U. S. l. c. 277; *Keystone Co. v. Martin*, 132 U. S. l. c. 91.

<sup>7a</sup> 113 U. S. 545.

In *Central Trust Co. v. Grant Locomotive Works*,<sup>7b</sup> a decree was held final, upon an intervening petition filed *pro interesse suo*, adjudging that locomotives under lease and contracts of conditional sale should be paid for out of the proceeds of a mortgage foreclosure. That decree was made upon a matter distinct from the general subject of the litigation, which was the foreclosure of the mortgages.

In *Savannah v. Jesup*<sup>8</sup> a municipal corporation intervened in a foreclosure suit to collect certain taxes due upon the mortgaged property. Its claim was denied, and the Supreme Court held that it had a right of appeal, where the amount in controversy was sufficient under the then existing limitations.

An order of a federal court, which had appointed a receiver, denying to a mortgagee the right to sell the property upon default, pursuant to the terms of the mortgage, is final and appealable.<sup>9</sup> The disallowance of the claim of an intervening petitioner to property in the hands of the receiver has been held final.<sup>10</sup> Reference in this connection may be made to the general statements contained in *Krippendorf v. Hyde*,<sup>10a</sup> as well as in many other cases.

§ 4. **The Same.**—As further instances of quasi-independent controversies, grafted upon the main stem, the proceedings by way of criminal contempt are illuminative.

Whether an order punishing a contempt is a final and appealable order or judgment, depends upon whether the contempt proceeding had for its essential object and aim the vindication of the authority of the court as an organ of the sovereign, or was in the nature of a proceeding to protect the rights of a party to the suit and made for his benefit.<sup>11</sup>

If punitive and vindictory in quality, the contempt pro-

<sup>7b</sup> 135 U. S. 207.

<sup>8</sup> 106 U. S. 563.

<sup>9</sup> *Gay v. Hudson River Co.*, 184 Fed. 689.

<sup>10</sup> *Dexter Horton Bank v. Hawkins*, 190 Fed. 924.

<sup>10a</sup> 110 U. S. 276.

<sup>11</sup> *Doyle v. Insurance Co.*, 204 U. S. 599.

§ 4 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ceeding is regarded as independent and collateral, and the order or decree punishing the offenses disposes of that matter—puts an end to that particular controversy between the government and its contemnor—and is consequently reviewable as final. Otherwise not.<sup>12</sup>

There are other cases where the proceeding is in itself a bundle or grouping of controversies. Thus in the case of *Wethenbury v. U. S.*,<sup>13</sup> the government seized a large quantity of cotton and other contraband property, and instituted several libels, by way of condemnation proceedings, which were subsequently consolidated. A, B, and others appeared as claimants of various portions. A's claim was disallowed and dismissed, whereupon he appealed. Upon the ground that the remaining claims were still undetermined, it was sought to dismiss his appeal as premature; but the Court held that the decree of dismissal disposed of the whole controversy upon that particular claim. It was final as to A, and A's rights, as against the U. S.<sup>14</sup>

In still other cases the intrinsic cleavage is not so pronounced, but is rather imported by manner of judicial treatment. In an early and celebrated case, which has been considerably criticised, an assignee in bankruptcy brought a bill to set aside sundry deeds for lands and slaves charged to have been fraudulently executed by the bankrupt, and for an account of rents and profits; and also for an accounting for certain sums of money charged to have been fraudulently turned over to one or more of the defendants by the bankrupt defendant.

The Court gave a decree finding that two parcels of property, among others, and certain slaves had been fraudulently transferred to A and B, and declaring the deeds and convey-

<sup>12</sup> *Re Merchants Stock and Grain Co.*, 223 U. S. 639; *Alexander v. U. S.*, 201 U. S. 117; *Nelson v. U. S.*, 201 U. S. l. c. 98; *In re Christensen*, 194 U. S. 458; *Webster Coal Co. v. Cassatt*, 207 U. S. 181; *Bessette v. Conkey Co.*, 194 U. S. 324.

<sup>13</sup> 5 Wall. 819.

<sup>14</sup> Cf. *Scriven v. North*, 134 Fed. 366.

ances thereto null and void; and directed the said parcels of land and the said slaves to be delivered up to plaintiff for the benefit of the bankrupt's creditors and awarded execution therefor. The decree further directed the master to take an account of the rents and profits of the land and slaves so ordered to be given up, and also an account of certain moneys alleged to have been fraudulently received by C, another of the defendants; and concluded by retaining so much of the bill as related to the matters referred to the master, and dismissing (as to matters not adjudged or retained) the bill without prejudice. A and B appealed, and a motion was made to dismiss the appeal upon the ground that the decree appealed from was not final. The Supreme Court criticised the practices of the court below, but sustained the appeal, saying: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court."

The case has been explained as distinguishing *judgment* and *execution*. I prefer to put it upon the ground, that by its conduct the Court had bodily severed the controversy, and had rendered a decree that in essence and actual effect was final upon the rights of particular parties. The land and slaves claimed by A and B were taken out of their possession, to be sold and the proceeds scattered among the creditors of the bankrupt, working an irreparable and final injury.<sup>15</sup>

A peculiar case of severance in treatment is *Stewart v. Masterson*.<sup>16</sup> This was a bill in equity against A and B. A defaulted and the bill was taken *pro confesso* and ordered to be proceeded with *ex parte* as against him. Thereafter B successfully demurred, and the Court ordered the bill dis-

<sup>15</sup> *Forgay v. Conrad*, 6 How. 201; Cf. *Dean v. Nelson*, 7 Wall. 342; *Carondelet Co. v. La.*, 233 U. S. 362.

<sup>16</sup> 131 U. S. 151.



missed as to him. From this latter order, the complainant appealed, and a motion was made to dismiss the appeal; held final order as to B, and appealable by complainant.<sup>17</sup>

§ 5. **The Same—Joint Claims.**—In *Hill v. Chicago, Etc., R. R. Co.*,<sup>18</sup> the complainant filed his bill against a number of individual and corporate defendants, and the decree of the Court was that the bill should stand dismissed, with costs, upon all matters and things therein in controversy, except as to the amount of money paid by one of the defendants in the execution of a particular contract, being one of the matters with respect to which relief was claimed. The Court, however, expressly retained this matter for adjudication as to the particular defendants concerned in it; and referred this controversy to a master for further investigation and report, upon the coming in of which, such further decree was to be rendered as might be equitable. The complainant took an appeal, but failed to perfect it, and it was dismissed on motion. Some two years later, upon the confirmation of the master's report, the Court rendered a decree finding against one of the remaining defendants, upon the matter involved in the reference, and dismissing the suit for want of equity as to the others. Thereupon complainant took a second appeal, assigning all his claims of error as against the matters embraced in the first or original decree.

The Supreme Court held that the original decree was final as to all matters determined by it, saying, among other things: "But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a *severable matter* from the other subjects of controversy and did not affect their determination." The first decree was final as to the controversies it had fully settled; and the second decree was equally final as to the remaining and sundered controversy.

<sup>17</sup> But see *Frow v. de la Vega*, 15 Wall. 552.

<sup>18</sup> 140 U. S. 52.

Another very interesting case of the same character was decided by the Circuit Court of Appeals, wherein the complainant sued to procure a cancellation of certain conveyances and a partition of the property embraced therein; or, in the alternative, if the Court should find against her, for an accounting is against certain defendants who were charged, in fraud of her rights, with having made the conveyances. The lower court rendered a decree finding that complainant had no title to the property and was therefore not entitled to partition; dismissed her bill as against the defendants holding the title; but retained for further consideration the duty of the remaining defendants to account for the proceeds. The decree was held final and appealable; and it could only have been so held, on the theory that the bill contained two severable or distinct matters or legal controversies, one of which had been fully adjusted as between the parties thereto.<sup>19</sup>

Let it be particularly observed, however, that in neither of the foregoing cases was there any allegation of joint liability on the part of all the various defendants. Such an allegation would seem to tie together—to make integral the controversy staged by the complainant. Thus in *Hohorst v. Hamburg-American Co.*,<sup>20</sup> the bill was dismissed by the Court as to one of the defendants for lack of jurisdiction over his person, and the complainant appealed. The suit was for infringement of patent, and the bill expressly asserted a joint liability. The Court said: "There are cases in equity in which a decree, disposing of every ground of contention between the parties, except as to the ascertainment of an amount in a matter separable from the other subjects of controversy, and relating only to some of the defendants may be treated as final, though retained for the determination of such severable matter. . . . But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that all the defendants have co-

<sup>19</sup> *Jackson v. Jackson*, 175 Fed. 710.

<sup>20</sup> 148 U. S. 262.

operated and participated in all the said acts and infringements." The appeal was dismissed because the judgment was not final. It was accordingly held in *ex parte* Enameling & Stamping Co.,<sup>21</sup> that the rule as to severability does not apply to cases where the liability of the defendants is alleged to be joint; and therefore cannot apply to a case where there is but a single defendant.

§ 6. **The Same—Severability of Particular Matters.**—There are other instances of severable and distinct controversies. Thus a substantial error, to the prejudice of one of the parties, may originate in the so-called process of execution; as in a decree distributing and disposing of the proceeds of a sale under a final decree of foreclosure. A party so aggrieved would unquestionably have the right to appeal.<sup>22</sup>

In *Bank of Lewisburg v. Sheffey*,<sup>22a</sup> it was held that an appeal might be taken from a decree in execution of a prior decree in the same suit, for the purpose of correcting errors which may have originated in the subsequent proceedings.<sup>23</sup>

In another case, A brought a bill to enforce by judicial decree of sale a lien he claimed against certain railroad property. B was permitted to intervene and file an answer and cross-bill by which he set up a prior lien by mortgage, which he sought to have established and enforced. The court below decreed the mortgage a first lien and A's claim a second, and passed a final decree for the sale of the property. All parties appealed, with *supersedeas*. Thereupon the lower court authorized its receivers, who were still in control, to borrow money upon receivers' certificates, the same to constitute a superior charge against the road. B appealed from this order, and the Supreme Court held it final and appealable. It constituted judicial action that materially and irreparably affected the interests of B, who held a first lien

<sup>21</sup> 201 U. S. 1. c. 165.

<sup>22</sup> *Chicago, Etc., Ry. Co. v. Fosdick*, 106 U. S. 82.

<sup>22a</sup> 140 U. S. 445.

<sup>23</sup> Cf. *Forgey v. Conrad*, 6 How. 201.

which the order complained of sought to postpone and subordinate.<sup>24</sup>

In another and very celebrated litigation, the lower court revived a suit in the name of the complainant's executor, upon a bill of revivor after the decree; expressly vesting the executor with the full benefits and protection of the original decree. The defendants appealed. The Supreme Court said that such an order, under the circumstances, was *so essentially decisive* and important, as affecting the rights of the defendants, that no doubt could be entertained as to its finality.<sup>25</sup>

In a recent case in Court of Appeals, there was a decree authorizing the receiver of a corporation to sell its property at private sale, which decree was approved after hearing objections and so entered that no confirmation of the sale to be made thereunder was contemplated or required. The necessary effect was that the sale would vest title absolutely in the purchaser, and the subsequent litigation could relate only to the disposition of the proceeds. It was held final, because it irrevocably disposed of the property to which it related, and left to aggrieved parties no adequate remedy except recourse to an appeal.<sup>26</sup>

A receiver in a foreclosure suit may appeal from a decree settling his accounts, although he is not a party to the main litigation at all. The controversy there is distinct in its nature, and its disposition has no effect upon the decree of foreclosure and sale, or the title of the purchaser thereunder.<sup>27</sup>

In *Trustees v. Greenough*,<sup>27a</sup> a bondholder brought an action in behalf of himself and all others holding bonds, to bring to account the trustees of the property, who were charged with colluding to waste and dissipate it. The complainant carried on, at his own cost and with great per-

<sup>24</sup> *Ex parte Farmers Loan, Etc., Co.*, 129 U. S. 206.

<sup>25</sup> *Terry v. Sharon*, 131 U. S. 40.

<sup>26</sup> *Stokes v. Williams*, 226 Fed. 148; Cf. *Sage v. Central R. R. Co.*, 96 U. S. 712.

<sup>27</sup> *Hinckley v. Railroad Co.*, 94 U. S. 467.

<sup>27a</sup> 105 U. S. 527.

sonal labor, a vigorous litigation which brought in and secured a very large sum of money. He then petitioned for an allowance for his work and expenses, which was referred to a master and approved upon the latter's report. The defendants appealed. The Court said: "The first question is, whether these orders do or do not amount to a final decree, upon which an appeal lies to this Court. They are certainly a final determination of the particular matter arising upon the complainant's petition for an allowance, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision."<sup>28</sup>

**§ 7. Cross-bills—Petitions to Remove—Other Judgments Not Final.**—Under the equity practice, as it formerly existed, a cross-bill was regarded as a mere dependent and auxiliary suit; and a decree disposing of the cross-bill was not final and could only be reviewed on an appeal from final decree upon the whole case.<sup>29</sup> In the same way, a cross-bill under admiralty rule 53, being a counterclaim arising out of the subject-matter of the libel, is an incident and appanage of the main proceeding; so that no appeal can ordinarily be taken from a decree dismissing the cross-bill where the principal proceeding is undetermined.<sup>30</sup> To what extent, and under what circumstances, these rules will be applied to the counterclaims newly provided for by the Equity Rules is not yet decided.

A petition to remove a suit to the federal court is plainly not regarded as an independent and collateral proceeding; because it is held that an order remanding the cause to the state

<sup>28</sup> Cf. *St. L. I. M. & S. Co. v. Southern Express Co.*, 108 U. S. 24; *Cf. Ruggles v. Patton*, 143 Fed. 312.

<sup>29</sup> *Ayres v. Carver*, 17 How. 591; *Ex parte South, Etc., R. R. Co.*, 95 U. S. 221; *Winters v. Ethell*, 132 U. S. 207; *Bowker v. U. S.*, 186 U. S. 1. c. 138.

<sup>30</sup> *Bowker v. U. S.*, 186 U. S. 135.

court is not a final order or judgment.<sup>31</sup> So an order overruling a motion to remand to the state court is not final.<sup>32</sup>

The appointment of a receiver is not *final*, but is a mere step in the cause. His possession is that of the court, and neither the title nor the rights of the parties are thereby changed.<sup>33</sup>

For the same reason, an order to pay a fund into the registry of the court for preservation pending litigation as to its ownership is not to be regarded as a final decree.<sup>34</sup>

It is sometimes laid down that a motion for new trial is a separate and independent proceeding, and no part of the cause.<sup>35</sup>

Questionable as this seems, it is plain that the granting or refusal of such a motion is not in itself *essentially decisive* of any part of the controversy; and is furthermore the exercise of a judicial discretion in the court below which it is generally impracticable to undertake to control. The same considerations would apply to orders granting or refusing a rehearing.<sup>36</sup>

In this connection, it may be pointed out that orders refusing to quash executions;<sup>37</sup> refusing to quash an attach-

<sup>31</sup> *Richmond, Etc., Ry. Co. v. Thouron*, 134 U. S. 45; *Gurnee v. Patrick*, 137 U. S. 141; *Chicago, Etc., Ry. Co. v. Roberts*, 141 U. S. 690; *German-American Bank v. Speckert*, 181 U. S. 405; *Joy v. Adelbert College*, 146 U. S. 355.

<sup>32</sup> *Bender v. Pennsylvania Co.*, 148 U. S. 502.

<sup>33</sup> *Grant v. Phoenix Ins. Co.*, 106 U. S. 429.

<sup>34</sup> *Louisiana Nat'l Bank v. Whitney*, 121 U. S. 284.

<sup>35</sup> *Cloquet Lumber Co. v. Barnes*, 222 Fed. 857; *U. S. v. Daniel*, 6 Wheat. l. c. 547-8.

<sup>36</sup> Cf. *Barr v. Gratz*, 4 Wheat. l. c. 220; *Brown v. Clarke*, 4 How. l. c. 15; *Henderson v. Moore*, 5 Cranch. 11; *Brockett v. Brockett*, 2 How. 238; *C. & O. Canal Co. v. Bank*, 8 Pet. 259; *Steines v. Franklin County*, 14 Wall. 15; *Hardin v. Boyd*, 113 U. S. 756; *Bank v. Sheffey*, 140 U. S. 445; *San Pedro, Etc., Co. v. U. S.*, 146 U. S. 120; *Iron, Etc., Co. v. R. R. Co.*, 62 Fed. 169.

<sup>37</sup> *Boyle v. Zacharie*, 6 Pet. 648; *Evans v. Gee*, 14 Pet. 1; *Ames v. Smith*, 16 Pet. 303; *McCargo v. Chapman*, 20 How. 555; *Early v. Rogers*, 16 How. 599; *Loeber v. Schroeder*, 149 U. S. l. c. 584; *U. S. v. Frerichs*, 106 U. S. 160.

ment;<sup>38</sup> denying or granting writs of restitution in ejectment;<sup>39</sup> refusing to enter an *exoneretur* of bail;<sup>40</sup> refusing to *Smith v. Trabue*, 9 Pet. 4.

grant certificate of reasonable cause for prosecution;<sup>41</sup> or setting aside an amendment of the term in ejectment,<sup>42</sup> stand upon the same basis as motions for new trial and are not appealable.

§ 8. **Difficulty in Distinguishing Judicial and Ministerial.**

—The distinction between *judicial* and *ministerial*, *judgment* and *execution*, is sometimes rather close and unsatisfactory. In *Winthrop Iron Company v. Meeker*,<sup>42a</sup> minority stockholders of the Iron Company bought a stockholders' bill against the Iron Company, certain of its directors and the Y company, seeking to annul as fraudulent a lease authorized to be made to the company of the Iron Company's property. The court decreed the lease void, appointed a receiver to manage the business of the Iron Company, and directed the defendants to surrender the leased property to the receiver, who was authorized to continue the business until the further order of the court. It was further ordered that the defendants in possession account before the master for ores mined and profits realized.

Upon appeal from this decree, the Supreme Court said: "The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill. . . . The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry that decree into execution. Such a decree has always been held to be final for purposes of appeal."

In view of the statement stressed by the Court, to the effect that the account was no part of the relief prayed by the

<sup>38</sup> *Toland v. Sprague*, 12 Pet. 300.

<sup>39</sup> *Gregg v. Forsyth*, 2 Wall. 56; *Barton v. Forsyth*, 5 Wall. 190;

<sup>40</sup> *Morsell v. Hall*, 13 How. 212.

<sup>41</sup> *U. S. v. Frerichs*, 106 U. S. 160.

<sup>42</sup> *Pickett v. Ledgerwood*, 7 Pet. 144; *Walden v. Craig*, 9 Wheat. 576.

<sup>42a</sup> 109 U. S. 180.

bill, it may be asked whether the decision would have been different, if the relief as to the account had been expressly prayed. The accounting *was* granted, so that it must have been impliedly involved in the relief sought. In a jurisdiction that strikes through forms, this part of the reasoning is not satisfactory. If granted, the accounting would seem to be in essence no more a *judicial* act in the one case than the other.

The perfect counterpart of this case, where the accounting was in the prayer for relief, I have not been able to lay my hands upon. It is well settled, however, in bills praying injunction against patent infringement and an accounting for damages; that a decree determining the validity of the patent, perpetually enjoining infringement, and referring to a master the taking of an account for damages, is not final, but interlocutory.<sup>43</sup>

It is furthermore well-settled, that a reference may be for a ministerial purpose only, by way of executing what has been decreed; in which event the decree is final; or it may be for the purpose of stating an account between the parties, as a basis and foundation for further judicial action; in which event the decree is not final.<sup>44</sup>

Upon the whole subject of final and interlocutory decrees, the cases of *Keystone, Etc., Co. v. Martin*,<sup>45</sup> and *McGourkey v. Toledo, Etc., Ry. Co.*,<sup>46</sup> should be carefully studied, as leading authorities; bearing in mind the statement of Justice Brown, in the latter case, that “probably no question of equity practice has been the subject of more frequent discussion in this Court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious.” I believe, however, that a careful examination of the cases will induce the belief that, while the reasons given are not al-

<sup>43</sup> *Barnard v. Gibson*, 7 How. 650; *Hunniston v. Stanthorp*, 2 Wall. 106; *Smith v. Vulcan Iron Works*, 165 U. S. 578.

<sup>44</sup> *McGourkey v. Toledo, Etc., Ry. Co.*, 146 U. S. 536; *Latta v. Kilbourn*, 150 U. S. 524.

<sup>45</sup> 132 U. S. 91.

<sup>46</sup> 146 U. S. 536.



ways happy, the decisions themselves square with reason and justice.<sup>47</sup>

From the premises assumed by the Supreme Court, it is fair to infer that the same general rules, as to finality of decrees, apply in admiralty as in equity cases.<sup>48</sup>

**§ 9. Finality—Orders by Judge—Conception Below—Conditions.**—The ordinary rule is that judicial power is vested in *courts*. A *judge* sitting in chambers could probably make no *final* order or decree at all, affecting the rights of any one. The general statutes granting appellate jurisdiction do not justify the taking out of an appeal or writ of error to review an order in chambers.<sup>49</sup>

We shall shortly note one exception to the non-reviewable character of interlocutory orders, laid down in Section 129 of the Judicial Code, relating to appeals from the granting, continuing, refusal or dissolution of an injunction or the appointing of a receiver. That section provides for review not only where such an order is made by the district court, but where made “by a judge thereof in vacation.”

It may be stated further, that where there is doubt whether a judgment or decree is final, the Appellate Court will resolve that doubt in favor of the correctness of the conception manifested by the lower court.<sup>50</sup>

Thus it is said that the treatment of the case by the parties and the Court may sometimes make that a final decree which does not dispose all the issues presented.<sup>51</sup>

It is said that in reviewing the judgment of the Supreme Court of a state, the Supreme Court of the United States will consider that a final judgment which is so regarded in the

<sup>47</sup> Cf. *Ex parte Enameling Co.*, 201 U. S. 156.

<sup>48</sup> *Deslions v. Compagnie Transatlantique*, 210 U. S. 1. c. 112.

<sup>49</sup> *Lambert v. Barrett*, 157 U. S. 697; *McKnight v. James*, 155 U. S. 685; *Morgan v. Thornhill*, 11 Wall. 65; *Hentig v. Page*, 102 U. S. 219.

<sup>50</sup> *Deslions v. Compagnie Generale*, 210 U. S. 1. c. 112.

<sup>51</sup> *Vicksburg v. Henson*, 231 U. S. 259.

jurisprudence of the state;<sup>52</sup> but the decrees of inferior federal courts are to be tested as to finality by the federal statutes and the rules of decision laid down by the federal courts, and state procedure can have no influence.<sup>53</sup>

Where a decree is conditional, and the condition has not taken and may not take effect, depending upon future occurrences, the decree is not final.<sup>54</sup>

§ 10. **Appellate Judgments.**—A word more may be here added with respect to the finality of judgments and decrees rendered by appellate tribunals. Most, if not all, that has been said, is equally applicable to them. The usual test of finality is whether or not, by the decision in question, the *judicial* phase of the controversy is entirely completed; so that if the case is referred to the primary court, it is sent there for the *ministerial* entry and execution of a precisely indicated judgment or decree, nothing being left to judicial discretion below.<sup>55</sup>

A decision in an appellate tribunal, having jurisdiction to examine and review a decision below, which affirms the action of the lower court in all respects, is necessarily final, where the decision below is final;<sup>56</sup> but where the original order or judgment in the court of first instance was interlocutory, a permissive appellate review merely of that order or judgment is inevitably interlocutory, whether it results in

<sup>52</sup> *Wheeling, Etc., Bridge Co. v. Bridge Co.*, 138 U. S. 287; *Cf. C. & O. Ry. Co. v. McCabe*, 213 U. S. 207.

<sup>53</sup> *Elder v. McClaskey*, 70 Fed. 529.

<sup>54</sup> *Jones v. Craig*, 127 U. S. 212; *Stratton v. Dewey*, 79 Fed. 32; *Paducah v. East Tenn. Tel. Co.*, 229 U. S. 476; *Cf. Tuttle v. Clafin*, 66 Fed. 7; *U. S. v. Three Friends*, 166 U. S. 1.

<sup>55</sup> *Mower v. Fletcher*, 114 U. S. 127; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Lodge v. Twell*, 135 U. S. 232; *California Nat'l Bank v. Stateler*, 171 U. S. 447; *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238; *Martinez v. International Banking Corp.*, 220 U. S. 1. c. 223.

<sup>56</sup> *T. & P. Ry. Co. v. Gentry*, 163 U. S. 1. c. 363.

§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

affirmance or reversal.<sup>57</sup> Where the Appellate Court reverses the judgment below, and orders judgment to be entered in the lower court upon the findings, in favor of plaintiff, "as prayed for in his complaint" there is a precisely indicated judgment, and the appellate decision is final;<sup>58</sup> but the judgment of an appellate court, reversing and remanding a cause for proceedings "in harmony with this opinion," or "for further proceedings in conformity herewith," is not final. It is impossible to anticipate what action may be taken below. Pleadings may be vitally amended, and new and material evidence presented to judicial cognizance. It is impossible to say that the judgment is final, because we cannot deny in advance any possible judicial quality to the subsequent proceedings.<sup>59</sup>

§ 11. **Motions for Rehearing Defer Finality.**—The statutes of the United States prescribe periods of limitation within which an appeal or writ or error must be sued out. It is well-settled, that where a motion for new trial or for a rehearing is filed in due season, and is entertained by the court, the time limited for appeal or writ of error does not begin to run until the motion is disposed of. Until then the judgment or decree does not take final effect for the purposes of error or appeal at all.<sup>60</sup>

<sup>57</sup> *Gibbons v. Ogden*, 6 Wheat. 448; *Beaupre v. Noyes*, 138 U. S. 397; *Meagher v. Minnesota, Etc., Mfg. Co.*, 145 U. S. 608; *Loeber v. Schroeder*, 149 U. S. 580; *Werner v. Charleston*, 151 U. S. 360; *Mo. & Kansas, Etc., Ry. Co. v. Olathe*, 222 U. S. 185.

<sup>58</sup> *Mower v. Fletcher*, 114 U. S. 127; *Smith v. Adams*, 130 U. S. 167; *Merrill v. Bank*, 173 U. S. 131.

<sup>59</sup> *Haseltine v. Bank*, 183 U. S. 130; *Schlosser v. Hemphill*, 198 U. S. 173; *Cincinnati, Etc., Ry. Co. v. Snell*, 179 U. S. 395; *Rice v. Sanger*, 144 U. S. 197; *Union Mutual Co. v. Kirchoff*, 160 U. S. 374; *Chicago, Etc., Ry. Co. v. Osborne*, 146 U. S. 354; *Brown v. Baxter*, 146 U. S. 619; *District v. McBlair*, 124 U. S. 320.

<sup>60</sup> *Texas, Etc., Ry. Co. v. Murphy*, 111 U. S. 488; *Memphis v. Brown*, 94 U. S. 715; *Aspen Mining, Etc., Co. v. Billings*, 150 U. S. 31; *Bierce v. Waterhouse*, 219 U. S. l. c. 336; *Kingman v. Western Mfg. Co.*, 170 U. S. 675.

There are limits to the rule even as stated. An application for a rehearing made after the time limited for appeal has expired, though filed within the time prescribed by the practice of the court, cannot operate to toll the expired limitation.<sup>61</sup>

§ 12. **Appeals from Interlocutory Judgments.**—There are certain statutory provisions granting the right of appeal from interlocutory orders. The most important of these is Section 129 of the Judicial Code. It is thereby provided, in effect, that an appeal may be taken, in any case, to the Circuit Court of Appeals, from any “interlocutory order or decree, granting, continuing, refusing, dissolving or refuse, an injunction, or appointing a receiver.”

No matter what the nature of the case, whether involving constitutional questions or not, the appeal provided for by this section lies only to the Court of Appeals.<sup>62</sup>

Such appeal must be taken within thirty days from the entry of the order or decree complained of, and is entitled to precedence in the Appellate Court.<sup>63</sup>

The case as a whole, apart from the interlocutory order, is proceeded with in the lower court as though no such appeal had been taken, unless otherwise ordered.<sup>64</sup>

The power of review, upon such an appeal, is not confined to the act of granting the injunction, but extends to determining whether there is any insuperable objection in point of jurisdiction or merits, to the maintenance of the bill; and the Appellate Court has power of dismissal, if so found.<sup>65</sup>

Upon such appeal, the Appellate Court is not limited

<sup>61</sup> *Conboy v. Bank*, 203 U. S. 141.

<sup>62</sup> J. C., Sec. 129.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ex parte National Enameling Co.*, 201 U. S. 156; *Foote v. Parsons, Etc., Co.*, 196 Fed. 951; *Smith v. Vulcan Iron Works*, 166 U. S. 1. c. 525.

<sup>65</sup> *Denver v. New York Trust Co.*, 229 U. S. 1. c. 136; *Ex parte National Enameling Co.*, 201 U. S. 156; *Smith v. Vulcan Iron Works*, 165 U. S. 518.

merely to the part granting the injunction, but is authorized to review the whole of the interlocutory decree.<sup>66</sup>

The Supreme Court, notwithstanding the exclusive character of the appellate jurisdiction, is entitled to review decisions of the Court of Appeals in such cases by a *certiorari*, as in other cases.<sup>67</sup>

The party appealing from an interlocutory injunction is not thereby entitled to a *supersedeas* as a matter of course. Whether or not there shall be a *supersedeas* is dependent upon the discretion of the lower court.<sup>68</sup>

I assume the rule to be the same with respect to the appointment of a receiver, and the granting of *supersedeas* therefrom.<sup>69</sup>

The Appellate Court would seem to have inherent power to stay or supersede the proceedings, as an incident of the appeal.<sup>70</sup>

§ 13. **The Same.**—By Section 266 of the Judicial Code, as amended, “an appeal may be taken direct to the Supreme Court of the United States from the order granting or denying an interlocutory injunction” in the cases there provided for.

By the act of October 22, 1913, an appeal lies also to the Supreme Court from an order granting or denying an interlocutory injunction to suspend or set aside an order of the Interstate Commerce Commission.<sup>71</sup>

There may be other similar provisions; but, if so, they have escaped my attention.

<sup>66</sup> U. S. Fidelity Co. v. Bray, 225 U. S. 1. c. 214.

<sup>67</sup> Denver v. New York Trust Co., 229 U. S. 123.

<sup>68</sup> *In re Haberman Mfg. Co.*, 147 U. S. 525; *City of Shelbyville v. Glover*, 184 Fed. 234.

<sup>69</sup> Cf. *In re McKenzie*, 180 U. S. 536; *Mann v. Gaddie*, 158 Fed. 42.

<sup>70</sup> *Ibid.*

<sup>71</sup> 38 Stat. 220.

## CHAPTER XXI.

### APPELLATE PROCEDURE—LAW AND EQUITY.

- § 1. Similarity of Rules for Appeal and Error.
- 2. The Scope of the Two Processes.
- 3. The Record—Exceptions—Preservation of.
- 4. Making Up the Bill.
- 5. Sealing and Signing—By What Judge.
- 6. Time for Filing Bill.
- 7. The Same—Term Bill.
- 8. May be Filed After Error Sued—Recitations of Extension.
- 9. Exceptions in Equity.
- 10. Petition for Writ of Error—Allowance.
- 11. Petition for Allowance of Appeal—Allowance.
- 12. Whether Allowed as of Right—Continuations of Litigation  
—Necessity for Summons and Severance.
- 13. Summons and Severance.
- 14. Persons Who May Appeal or Bring Error.

§ 1. **Similarity of Rules for Appeal and Error.**—It is, in effect, provided by statute that appeals from the district courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed by law for writs of error.<sup>1</sup>

Most of the rules of court dealing with the steps necessary for the transfer of the cause to the appellate tribunal apply in terms to both alike. It has seemed to me best to undertake their joint treatment, pointing out from time to time their existing differences. This scheme has disadvantages which have impelled most writers to separate consideration; but it has the inestimable advantage of avoiding constant cross-reference or wearisome repetition.

§ 2. **The Scope of the Two Processes.**—The scope of appellate review at law is necessarily narrower than in equity. It is laid down by the Seventh Amendment (for the adoption of which a great clamor was raised in some of the state con-

<sup>1</sup> R. S. 1012; J. C., 291.

### § 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

ventions) that no fact tried by a jury can ever be re-examined in any federal court otherwise than according to the rules of the common law. Constitutional policy in this respect is given emphatic repetition by statute.<sup>2</sup>

The only machinery ever provided by the common law for the retrial or re-examination of the facts found by a jury in an action at law, consisted in the new trial granted below, or the award of a *venire facias de novo* by the Appellate Court upon reversal for error in law.<sup>3</sup>

The common law instrument of review (which is almost universally recognized or prescribed by federal statutes) is the writ of error; which, operating solely upon the *record*, reaches *errors of law* apparent upon the face thereof.<sup>4</sup>

On the other hand, appeal (which is the organ of review in equity) differs especially from error, in that, in the absence of statutory restriction, the facts as well as the law are thereby submitted to the scrutiny of the appellate tribunal.<sup>5</sup>

§ 3. **The Record — Exceptions — Preservation of.** — Another and fundamental distinction between the two remedies (due indeed to their indicated difference in scope) is, or was, the extent to which they reach and embrace the record of the proceedings below.

By the ancient common law the *record* (as upon a writ of error) consisted only of the matters set forth upon the judgment roll. For other errors, no matter how serious, not *recorded* in this judicial history of the cause, but resting (as it was said) in *parol*, there was no remedy above until the statute of Westminster Second; which made provision for the preservation and review of such other errors, by the filing

<sup>2</sup> R. S. 1011.

<sup>3</sup> *Parsons v. Bedford*, 3 Pet. l. c. 447; *Abbotsford v. Johnson*, 98 U. S. 440; *Capital Traction Co. v. Hof*, 174 U. S. l. c. 8.

<sup>4</sup> *Suydam v. Williamson*, 20 How. 427; *Wadsworth v. Warren*, 12 Wall. 307; *Storm v. U. S.*, 94 U. S. 76; *Behn v. Campbell*, 205 U. S. 403.

<sup>5</sup> *Wiscart v. Dauchy*, 3 Dall. l. c. 327; *U. S. v. Goodwin*, 7 Cranch. l. c. 110; *Dower v. Richards*, 151 U. S. 658.

of written *exceptions*, sealed by the judges. The matters properly included in the judgment-roll constituted the strict or common-law *record*: the written and sealed exceptions, the *statutory* record, or *bill of exceptions*.<sup>6</sup>

It is not easy to frame a comprehensive statement of the matters included within the strict record, or record proper, as it is sometimes called. It is clear that the mere physical incorporation by the clerk of matters not properly of record cannot make them a part thereof. In general, it may be said that whatever is not necessary to support the validity of the judgment is presumptively no part of the record.<sup>7</sup>

In probably all cases, it will embrace at least the process, the pleadings, the verdict (general or special) and the judgment.<sup>8</sup> Contrary to the rule at common law, an agreed statement of facts, entered upon the record of a federal court, stands upon the same basis as a special verdict for the purposes of error.<sup>9</sup> The same is true of general or special findings by the judge, under the provisions of Section 700 of the Revised Statutes.<sup>10</sup>

Outside of such obsolete methods as *profert* and *oyer*, and the common-law demurrer to the evidence, there is no method of injecting evidence into the record at law, save by bill of exceptions; which is, moreover, the only possible method by which to review the admission or rejection of evidence, rulings on motions and the giving or refusing of instructions. Unless it is clear, therefore, that the record proper contains sufficient to reverse the case, such a bill must be properly made up and filed as the very foundation for the effectual review of a judgment at law.

<sup>6</sup> *Ex parte Crane*, 5 Pet. 1. c. 199; *Pomeroy's Lessee v. Bank*, 1 Wall. 592; *Nalle v. Oyster*, 230 U. S. 165.

<sup>7</sup> *U. S. v. Taylor*, 147 U. S. 1. c. 698-700.

<sup>8</sup> *Reed v. Gardner*, 17 Wall. 409; *Clune v. U. S.*, 159 U. S. 590; *Eldorado Mining Co. v. Marloth*, 215 Fed. 51.

<sup>9</sup> *U. S. v. Eliason*, 16 Pet. 291; *Suydam v. Williamson*, 20 How. 427; *Bond v. Dustin*, 112 U. S. 604.

<sup>10</sup> *Aetna Insurance Co. v. Brown*, 95 U. S. 117; *Allen v. Bank*, 120 U. S. 20.



§ 4. **Making Up the Bill.**—It was formerly the practice to write up each exception, as it was taken, into a separate bill, while the matter was yet fresh.<sup>10a</sup> It has long been settled, however, that instead of preparing separate bills for each separate matter, all the exceptions taken during the trial may be incorporated into one bill of exceptions;<sup>11</sup> and such is the general practice.

A bill of exceptions must show the ruling made and set forth affirmatively that an *exception* was taken thereto; a mere showing of *objection* is insufficient.<sup>12</sup> Inasmuch as its proper function is to afford a basis for review as to questions of law, it should not embrace matters having no bearing upon the errors of law complained of.<sup>13</sup> To this end, the rules generally provide that no bill of exceptions shall be allowed which shall set forth at large the Court's charge to the jury, upon any general exception to the whole of said charge; but the party excepting shall be required to state distinctly the several matters of law in the charge to which he excepts; and these only shall be inserted in the bill. The Supreme Court has condemned vigorously the violation of this rule.<sup>14</sup>

It is further provided by the same rules of court that only so much of the evidence shall be inserted as necessary to present clearly the questions of law involved in the rulings to

<sup>10a</sup> Cf. *Moore v. Bank*, 13 Pet. 305; *Wilkes v. Dinsman*, 7 How. 89.

<sup>11</sup> *Bank v. Patteson*, 7 Cranch. l. c. 302; *Pomeroy v. Bank*, 1 Wall. 592; *Lees v. U. S.*, 150 U. S. 476.

<sup>12</sup> *U. S. v. Breitling*, 20 How. 252; *Pomeroy v. Bank*, 1 Wall. 592; *Stimpson v. Westchester R. R. Co.*, 3 How. 553; *Laher v. Cooper*, 7 Wall. 565; *Fishburn v. R. R. Co.*, 137 U. S. 60; *Tucker v. U. S.*, 151 U. S. 164; *Newport News Co. v. Pace*, 158 U. S. 36; *Rodriguez v. U. S.*, 198 U. S. 156.

<sup>13</sup> *Zeller's Lessee v. Eckert*, 4 How. 289; *Lincoln v. Claffin*, 7 Wall. 132; *U. S. v. Rindskopf*, 105 U. S. 418; *Lewis v. U. S.*, 146 U. S. l. c. 383.

<sup>14</sup> *Conard v. Ins. Co.*, 6 Pet. 262; *Gregg v. Sayre*, 8 Pet. 244; *U. S. v. Rindskop*, 105 U. S. 418; *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183; *Van Stone v. Stillwell*, 142 U. S. 128; *Allis v. U. S.*, 155 U. S. 117; *Columbus Construction Co. v. Crane Co.*, 98 Fed. 946.

which exceptions are taken; and such evidence must be set forth in narrative and condensed form, unless a proper presentation of the question otherwise requires.<sup>15</sup>

It is manifest that cases arise where all the evidence must be set forth. The denial of a motion for directed verdict cannot be reviewed by the Appellate Court unless all the evidence is before it.<sup>16</sup>

That all the evidence is contained in the bill may be shown: By stipulation of counsel; express averment of the bill; fair implication of the bill; or by other portions of the record.<sup>17</sup> Similarly, if an instruction were excepted to on the ground that there was no evidence to justify or support it, it would be necessary to show by the bill that there was no such evidence.

It may happen that an isolated excerpt from a charge, taken by itself, could appear erroneous; but, qualified by other related portions, would be harmless. In such a case, it would seem proper that such qualificatory portions be set forth as well as the particular language. It is best, in most cases, to aver that no part of the charge cures the objection; or to add the whole charge to avoid adverse presumption.<sup>18</sup>

**§ 5. Sealing and Signing—By What Judge.**—It was formerly the law that a bill of exceptions must be *sealed* by the judge presiding at the trial;<sup>19</sup> but, prior even to the statute shortly to be referred to, the Supreme Court began to hold that, while the statute of Westminster prescribed a seal, yet

<sup>15</sup> Rule 4, Supreme Court; Rule 11, C. C. A.

<sup>16</sup> *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593; *Hansen v. Boyd*, 161 U. S. 1. c. 403; *U. S. c. Copper Queen Co.*, 185 U. S. 495; *Williamson v. U. S.* 207 U. S. 1. c. 453.

<sup>17</sup> *U. S. v. Copper Queen Co.*, 185 U. S. 495; *Clyatt v. U. S.*, 197 U. S. 207; *Gunnison County v. Rollins*, 173 U. S. 255; *Crowe v. Tuckey*, 204 U. S. 228.

<sup>18</sup> *Hicks v. U. S.*, 150 U. S. 442; *R. R. v. Tynam*, 119 Fed. 288.

<sup>19</sup> *Suydam v. Williamson*, 20 How. 427; *Pomeroy v. State Bank*, 1 Wall. 592; *Young v. Martin*, 8 Wall. 354.

§ 6 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

no act of Congress and no rule of court contained such a requirement; and that, though usual in federal practice, it was not necessary and signature was sufficient.<sup>20</sup> By statute passed in 1872 (now R. S. 953) the bill is sufficiently authenticated if *signed* by the judge of the trial court, or (if more than one) by the presiding judge thereof, without any seal.<sup>21</sup> Signature by initials is not sufficient.<sup>22</sup>

In the event the trial judge died or left the bench before the bill of exceptions was settled and signed, it necessarily followed that no bill could be filed, and the ordinary remedy for this situation was the granting of a new trial;<sup>23</sup> but this rule was changed by the amendment to Section 953, adopted in 1901. It was thereby provided that in the event the trial judge, by reason of illness, death or other disability should be unable to hear and pass upon the motion for new trial and allow and sign the bill of exceptions, the successor judge or any other judge of the court in which the case was tried (holding such court thereafter) might pass upon the motion and sign the bill; provided he was satisfied from stenographic notes or otherwise that he could fairly pass upon the motion or settle the bill.

There is no provision made for bills of exception by bystanders nor for impeaching the verity of the bill by affidavits. Mandamus will not ordinarily lie to compel the judge to certify what he claims to be untrue.

§ 6. **Time for Filing Bill.**—There is some ambiguity in the decisions as to when the bill of exceptions should be filed. The primary rule is, that the bill of exceptions should be presented for allowance and signature, at the latest, during the term at which the judgment was rendered.<sup>24</sup>

<sup>20</sup> *Generes v. Campbell*, 11 Wall. 193.

<sup>21</sup> *Herbert v. Butler*, 97 U. S. 319; *Origet v. U. S.*, 125 U. S. 240; *Metropolitan R. R. Co. v. McFarland*, 195 U. S. 1. c. 330.

<sup>22</sup> *Origet v. U. S.*, 125 U. S. 240.

<sup>23</sup> *Hume v. Bowle*, 148 U. S. 245; *Malony v. Adsit*, 175 U. S. 281.

<sup>24</sup> *Muller v. Ehlers*, 91 U. S. 249; *Jones v. Grover*, 24 L. ed. 925; *U. S. v. Jones*, 149 U. S. 262; *Jennings v. Philadelphia, Etc., Ry. Co.*,

This general rule was operative, because with the final judgment and the lapse of the term, the parties are gone from the court, which has reserved no control over them; and the attempted subsequent modification of the record, being a judicial act, affecting their rights in the absence of one of them is *coram non judice* and void. In a fashion utterly characteristic of the common law, this theory is not logically pursued.

The rule is subject to the following exceptions: (1) A standing rule of court otherwise providing; (2) an order of Court extending the time for filing; (3) the continuation of the Court's control over the judgment by the filing of a motion for new trial, or for rehearing, or some similar motion; (4) express consent or estoppel of the adverse party; (5) the equity of extraordinary circumstance.

Taking up these exceptions, in their order, a standing rule of court may reserve jurisdiction past the term, for the settling and filing of the bill of exceptions.<sup>25</sup> On the other hand, a rule of court may shorten and restrict the time during the judgment term, so that the bill must be filed during the prescribed period of the term, unless an extension be granted; but such a rule is generally regarded as being for the protection of the court, rather than for the benefit of the adverse party, and the court, in the exercise of equitable discretion, may, notwithstanding the rule, allow and sign the bill at any time during the term.<sup>26</sup>

In the second place, the court may retain control, by an

218 U. S. 255; *Brewster v. Evans*, 93 Fed. 628; *U. S. v. Kelly*, 89 Fed. 946; *Miller v. Morgan*, 67 Fed. 82; *U. S. v. Carr*, 61 Fed. 802; *Libby v. Crossley*, 40 Fed. 564; *Mahoning Valley R. R. Co. v. O'Hara*, 196 Fed. 945; *Wyss-Thalman v. Maryland Casualty Co.*, 193 Fed. 53.

<sup>25</sup> *Michigan Ins. Co. v. Eldred*, 143 U. S. 293; *Ex parte Chateaugay Iron Co.*, 128 U. S. 544; *Talbot v. Press Pub. Co.*, 80 Fed. 567; *Missouri, Etc., R. R. Co. v. Russell*, 60 Fed. 501.

<sup>26</sup> *Hunnicutt v. Peyton*, 102 U. S. 333; *New York, Etc., R. R. Co. v. Hyde*, 56 Fed. 188; *Southern Pac. Co. v. Johnson*, 69 Fed. 559; *Cf. Oxford, Etc., Co. v. Bank*, 153 Fed. 723.

order or orders extending the time to file.<sup>27</sup> Upon the theory of constantly preserving the reserved control, it would seem that further extensions, if any, should be granted before the prior extension has expired. Apparently such extensions are regarded as so decisively judicial, as to render the *judge* incapable (in the absence of rule) of making such an order in vacation.<sup>28</sup>

In the third place, the control of the court over exceptions, taken at the trial may be reserved by the filing (rather than by the filing and *entertaining*) of a motion for new trial or rehearing; so that the bill may be filed, or an extension of time therefor granted, during the term at which such motion was overruled.<sup>29</sup>

In the fourth place, the time may be extended by express consent of the parties, or by a sort of estoppel amounting to constructive consent.<sup>30</sup> It ought to be the law that such consent or conduct must be manifested during the term, or within the period of reserved or stipulated control.<sup>31</sup>

In the fifth class, we are confronted with cases where the party filing the bill is not responsible for the delay, which is brought about by extraordinary circumstances. These extraordinary circumstances may prevent the *presentation* of the bill at all within the requisite time; or may prevent its being *signed* and *filed* in due time. As instances of the latter

<sup>27</sup> *Ex parte* Bradstreet, 4 Pet. 1. c. 107; *Ward v. Cochran*, 150 U. S. 597; *Yellow Poplar, Etc., Co. v. Chapman*, 74 Fed. 444; *Koewing v. Wilder*, 126 Fed. 472.

<sup>28</sup> Cf. *Missouri, Etc., R. R. Co. v. Russell*, 60 Fed. 501; *Gulf, Etc., Ry. Co. v. Jackson*, 64 Fed. 79; See *Talbot v. Press Pub. Co.*, 80 Fed. 567.

<sup>29</sup> *Woods v. Lindvall*, 48 Fed. 73; *Tullis v. Lake Erie, Etc., Ry. Co.*, 105 Fed. 554; *Kentucky Distilleries Co. v. Lillard*, 160 Fed. 34; *Merchants Ins. Co. v. Buckner*, 98 Fed. 222; *Mahoning Valley Co. v. O'Hara*, 196 Fed. 945.

<sup>30</sup> *Jennings v. Philadelphia, Etc., Ry. Co.*, 218 U. S. 255; *Ex parte Chateaugay Iron Co.*, 128 U. S. 544; *Waldron v. Waldron*, 156 U. S. 361; *Hunnicutt v. Peyton*, 102 U. S. 333; *Gulf Ry. Co. v. Jackson*, 64 Fed. 79.

<sup>31</sup> Cf. *Waldron v. Waldron*, 156 U. S. 361; *Reliable Incubator Co. v. Stahl*, 102 Fed. 590; but see *Freeman v. U. S.*, 227 Fed. 732.

sort, where the bill was *presented*, but the judge was unable to settle the same within the time limited, reference may be made to the cases cited.<sup>32</sup> As instances of the former sort, the case may be cited where the judge had misplaced papers essential to the bill;<sup>33</sup> where the judge was taken with sudden illness;<sup>34</sup> where the court stenographer was unable to promptly write out his transcript.<sup>35</sup>

§ 7. **The Same — Term Bills.** — In *Michigan Insurance Bank v. Eldred*,<sup>36</sup> Justice Gray uses the following language: "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term." This is a careful statement by a judge who had a singular gift for solid and accurate generalization. It is noteworthy in two particulars. In the first place, it seems to limit the operation of the "extraordinary circumstance" rule to cases where the bill has been *presented* to the judge for allowance, within the time limited or reserved; whereas the lower federal courts, in a number of instances noted above, have taken a broader view. In the second place, it seems to require that the bill (in so far as it relates to exceptions taken at the trial) should be presented for allowance at such *trial* term, rather than the *judgment* term, as we have laid down above. Similar general language is found in many cases. Notwithstanding the implication, I think it unjustifiable.

<sup>32</sup> *U. S. v. Breitling*, 20 How. 252; *Davis v. Patrick*, 122 U. S. 138; *Western Dredging Co. v. Heldmaier*, 116 Fed. 179; *Pacific Bank v. Hannah*, 90 Fed. 72.

<sup>33</sup> *Pittsburgh, Etc., Co. v. Goff-Kirby Co.*, 151 Fed. 466.

<sup>34</sup> *Roberts v. Bennett*, 135 Fed. 748.

<sup>35</sup> *Dalton v. Gunnison*, 165 Fed. 873; Cf. *Whalen v. Sheridan*, 10 Fed. 661.

<sup>36</sup> 143 U. S. 293.

There is a deliberate discussion of this matter in an inferior court of recognized ability. "It is true it has sometimes been said in judicial opinions that the bill must be settled during the term at which the case was tried. But doubtless this was so said because in the usual practice of the courts the judgment is entered before the lapse of the term and the expression referred to was made in contemplation of the ordinary course. . . . It is accordingly the established rule that a bill of exceptions may be settled at any time during the term at which the cause is tried, and thereafter, if judgment is deferred, until the end of the term during which it is rendered."<sup>37</sup>

It seems to me the latter statement must be correct. It would be utterly futile to require a party to prepare, and the judge to examine, a long bill of exceptions, involving matters at the trial, when the result of that trial is still in the breast of the Court, and the result may do away with the necessity, on the part of the excepting party, of any bill of exceptions at all.

Upon this whole subject of bills of exception, there is a very full citation of authority in the case of *Scaife v. Western North Carolina Land Company*.<sup>38</sup>

It is the constant practice in the courts of this state, to preserve exceptions to interlocutory orders, such for example, as strike out portions of a pleading (where such an order antedates the trial term) by filing, during the term at which such order is made, what is called a term-bill of exceptions, signed and allowed by the judge. This practice is also followed in the local District Court of the United States.

It is undoubtedly the law that rulings upon such matters must be excepted to and made part of the record by bill of exceptions;<sup>39</sup> and some of these cases refer to state decisions.

<sup>37</sup> *Minahan v. Grand Trunk Ry. Co.*, 138 Fed. 37; *Preble v. Bates*, 40 Fed. 745.

<sup>38</sup> 87 Fed. 308.

<sup>39</sup> *Dietz v. Lymer*, 61 Fed. 792; *Fraser v. Washington*, 125 Fed. 280; *Ghost v. U. S.*, 168 Fed. 841.

I have been unable, however, with such aid as the digests afford, to find any federal decisions dealing with the necessity of a term bill of exceptions. Such practice books as Tidd, Archbold and Chitty seem to speak of no bill of exceptions save one taken at the trial; and there is authority for the position that, at common law, no such bill lay to any interlocutory ruling.

§ 8. **May be Filed After Error Sued—Recitations of Extension.**—It was once supposed that a writ of error could only reach the record as it actually stood at the time the writ was sued out; but it has long been settled that there is no legal reason why the writ of error should not precede the settlement of the bill of exceptions.<sup>40</sup> Where extraordinary circumstances are relied upon to excuse a delay in filing the bill, such facts should be certified by the trial judge in explanation of the delay.<sup>41</sup> In similar fashion, where a bill is filed beyond the appropriate term, pursuant to consent or orders in extension, it should contain an explicit statement of any order extending the time; or if consent be relied on, such consent should be therein distinctly averred.<sup>42</sup> Local rules are frequent and must be constantly examined.<sup>43</sup>

§ 9. **Exceptions in Equity.**—Turning now to equity, in the absence of statutory creation, there is no such thing in chancery appellate practice as a bill of exceptions.<sup>44</sup> This does not mean that it is unnecessary to make objections or

<sup>40</sup> *Hunnicut v. Peyton*, 102 U. S. 333; *Waldron v. Waldron*, 156 U. S. 361; *Old Nick Williams Co. v. U. S.*, 215 U. S. 541; *Shreve v. Cheesman*, 69 Fed. 785; *Camden Iron Works v. Slater*, 223 Fed. 611.

<sup>41</sup> *Pittsburgh Gas Co. v. Goff-Kirby Co.*, 151 Fed. 466.

<sup>42</sup> *Reliable Incubator Co. v. Stahl*, 102 Fed. 590.

<sup>43</sup> Cf. Rule 14, E. Dist. of Mo.

<sup>44</sup> *Story v. Story*, 12 Pet. 339; *Morrison v. Burnette*, 154 Fed. 617; *Dodge v. Norlin*, 133 Fed. l. c. 369; *Southern B. & L. Co. v. Carey*, 117 Fed. 325; *Continental Trust Co. v. Toledo, Etc., Ry. Co.*, 99 Fed. 177.

(As to the practice on issues out of chancery, see *Johnson v. Harman*, 94 U. S. 372; *Watt v. Starke*, 101 U. S. 247; *Wilson v. Riddle*, 123 U. S. 608.)



§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

save exceptions to interlocutory rulings as to evidence and other matters below. The maxim *qui tacet, videtur consentire* is applied in equity as well as law,<sup>45</sup> although cases may arise where there can be no presumption of consent, and no objection or exception is necessary;<sup>46</sup> but what is meant is that objections and exceptions are deemed recorded with the evidence and other proceedings during the whole course of the cause, and need no artificial or extraneous medium of preservation.

Under our modern system of oral testimony in the federal courts of equity, the record of the proceedings and the evidence no longer appears entirely in written form; and it is consequently necessary, in making up the transcript, to see to the inclusion of all matters which it is proposed to question in the Appellate Court; as we shall hereafter observe.

§ 10. **Petition for Writ of Error—Allowance.**—Assuming that these preliminary matters are properly disposed of, let us consider the successive steps in the transfer of the cause to the Appellate Court.

The rules contemplate that the appellant or plaintiff in error shall file a written petition with the clerk of the trial court, praying allowance of the appeal or writ of error to the appropriate Appellate Court.<sup>47</sup>

Although best that usual practice be pursued in such a matter, a petition for a writ of error is not essential.<sup>48</sup> Indeed it has been repeatedly stated that no allowance of a writ of error by court or judge is necessary.<sup>49</sup> By this I un-

<sup>45</sup> Rule 13, Supreme Court; Rule 12, C. C. A.; *Gorham v. Emery Co.*, 104 Fed. 243; *Ottumwa Box Car Co. v. Christy Co.*, 215 Fed. 362; *White v. Wansey*, 116 Fed. 345; *Kalamazoo, Etc., Co. v. Duff Co.*, 113 Fed. 264; *Goodwin v. Fox*, 129 U. S. 601.

<sup>46</sup> *Western Union, Etc., Co. v. U. S., Etc., Co.*, 221 Fed. 1. c. 551.

<sup>47</sup> Rule 35, Supreme Court; Rule 11, C. C. A.

<sup>48</sup> *Louisville Trust Co. v. Stockton*, 72 Fed. 1; *Wilmington v. Ricard*, 90 Fed. 211; *Fitzpatrick v. Graham*, 119 Fed. 353.

<sup>49</sup> *Re Virginia Commissioners*, 112 U. S. 177; *Davidson v. Lanier*, 4 Wall. 447; *Alaska, Etc., Mining Co. v. Keating*, 116 Fed. 561; *Loveless v. Ransom*, 109 Fed. 391.

derstand to be meant that no formal allowance is necessary; but that the Court will presume (at least in the absence of contrary showing) from the fact that the writ of error was issued and returned, that it was properly allowed.<sup>50</sup>

The approval of a bond and the signing of a citation constitute sufficient evidence of an allowance;<sup>50a</sup> and so where a bill of exceptions and a citation were signed.<sup>51</sup> It is absolutely essential that the writ be actually issued.<sup>52</sup>

**§ 11. Petition for Allowance of Appeal — Allowance. —** Neither is a formal petition essential in equity; and is, in fact, frequently dispensed with where the application for appeal is made in open court. The indispensable thing is an *allowance* of the appeal;<sup>53</sup> and even here the rule that equity looks to the heart and substance of the matter, rather than the form, is liberally applied.

It has been held many times that no formal allowance of an appeal is necessary.<sup>54</sup> The signing of a citation by the proper judge or justice (*Brown v. McConnell*, 124 U. S. 489; *Stewart v. Masterson*, 124 U. S. 493); the acceptance of security during the term at which the decree was rendered (*Sage v. Central R. R. Co.*, 96 U. S. 712); the taking security and signing citation (*Brandies v. Cochrane*, 105 U. S. 262; *Draper v. Davis*, 102 U. S. 370); prayer for appeal and approval and filing of appeal bond (*R. R. Co. v. Bradleys*, 7 Wall. 575); the approval of the appeal bond (*Re Fiechtl*, 107 Fed. 618); a formal order granting leave to file petition for appeal, with

<sup>50</sup> *Alaska, Etc., Mining Co. v. Keating*, 116 Fed. 561; *Wilmington v. Ricaud*, 90 Fed. 111; *Davidson v. Lanier*, 4 Wall. 447.

<sup>50a</sup> *Fitzpatrick v. Graham*, 119 Fed. 353.

<sup>51</sup> *Louisville Trust Co. v. Stockton*, 72 Fed. 1.

<sup>52</sup> *In re Ralston*, 119 U. S. 613; *Smith v. Ferst*, 66 Fed. 798.

<sup>53</sup> *Barrell v. Propeller Mohawk*, 3 Wall. 424; *Washington County v. Durant*, 7 Wall. 694; *Pierce v. Cox*, 9 Wall. 786; *Green v. City of Lynn*, 87 Fed. 839.

<sup>54</sup> *Brandies v. Cochrane*, 105 U. S. 262; *Sage v. Central R. R. Co.*, 96 U. S. 712; *Re Fiechtl, et al.*, 107 Fed. 618; *Chamberlin Transp. Co. v. South Pier Co.*, 126 Fed. 165; *Simpson v. Bank*, 129 Fed. 257; *Rector v. Alcorn*, 204 Fed. 748.

an accompanying assignment of errors, followed by acceptance of bond (Chamberlin Transp. Co. v. South Pier Co., 126 Fed. 165); have all been held to warrant the legal inference that the appeal was allowed.

Whatever the form, an application for allowance is to be made; and in this connection we must consider the parties by whom or in whose behalf, it may be presented.

**§ 12. Whether Allowed as of Right—Continuations of Litigation—Necessity for Summons and Severance.**—Where an appeal is permitted by statute, its allowance is a matter of right, and does not rest in the discretion of the court or judge.<sup>55</sup>

It has sometimes been said by inferior federal courts that a writ of error is allowable, not as a matter of right, but rather of discretion.<sup>56</sup> As applied to the lower federal courts, this statement seems strong. At common law, the writ issued, *ex debito justitiae*, as a matter of course.<sup>57</sup> While no direct federal authority seems to exist, an appeal is universally regarded as a continuation of the original, rather than the initiation of a new, proceeding. The Supreme Court (contrary to the prevailing rule at common law and to many expressions in the Courts of Appeals) has repeatedly laid down the same general doctrine with respect to writs of error.<sup>58</sup> It would seem, therefore (being matters of right and mere continuations, for most purposes, of the original litigation), that either appeal or writ of error would carry up, with the cause, all the parties to the litigation below. So to conclude would be a grave error. So far as the parties are concerned, appeal or error is, in effect, regarded as a new proceeding.

<sup>55</sup> *Steamship Douro v. U. S.*, 3 Wall. 564; *Ex parte Jordan*, 94 U. S. 248; *Southern B. & L. Ass'n v. Carey*, 117 Fed. 326; *Simpson v. Bank*, 129 Fed. 257; *McCourt v. Singers-Biggar*, 150 Fed. l. c. 104.

<sup>56</sup> (*E. g.*) *Simpson v. Bank*, 129 Fed. 257.

<sup>57</sup> Cf. *Virginia Commissioners*, 112 U. S. 177; *Re Claasen*, 140 U. S. 200.

<sup>58</sup> *Nations v. Johnson*, 24 How. 195; *Ex parte Chetwood*, 165 U. S. l. c. 461; *Bradford v. Southern Ry. Co.*, 195 U. S. l. c. 248.

The Appellate Court, in its review of the record, will not undertake to pass upon the rights of the parties fixed by that record, unless the parties whose rights are to be affected appear to have been given an opportunity to be heard.

In determining the necessity of parties, the judgment or decree is not treated as an indivisible integer, as to all the parties on either side. If A and B are plaintiffs and C and D defendants, it would be an arbitrary jurisprudence which would compel, against his own better judgment, C (or A) to join with D (or B) in seeking review of an adverse decision.

If C (or A) desired review, it would be an equally arbitrary jurisprudence which would refuse it, upon the ground that D (or B) was content with the finding. The law is not so unreasonable. Whether, with entire disregard of D (or B), C (or A) could sue out error or pray appeal alone, would depend upon the character of the decree or judgment. If it affected the parties on that side jointly and not severally, he could not; and if, under such circumstances, he sued out error or appeal alone, it would be dismissed as having been irregularly allowed.<sup>59</sup>

Parties united in interest must unite in the proceeding for review.<sup>60</sup> If, however, his interests (by way of right or liability) under the judgment are severable and distinct from those of his co-plaintiffs or co-defendants, a party may always maintain his writ or appeal alone. For example, A brought suit against B, to recover a debt and enforce a mechanic's lien therefor, making C and D (subsequent lienors) parties defendant. There was judgment for the debt against B, with the direction that if it could not be realized against him, the property should be sold, and plaintiff's claim paid out of the proceeds. B sued out error. Upon motion to dismiss, the Court held that there was a distinct personal judgment

<sup>59</sup> *Masterson v. Howard*, 10 Wall. 416; *Mussina v. Cavazos*, 20 How. 280; *Hampton v. Rouse*, 13 Wall. 187; *Simpson v. Greely*, 20 Wall. 152; *Downing v. McCarthy*, 19 L. ed. 757; *Feibelman v. Packard*, 108 U. S. 225; *Estes v. Trabue*, 128 U. S. 225; *Mason v. U. S.*, 136 U. S. 581.

<sup>60</sup> *Owings v. Kincannon*, 7 Pet. 399.

§ 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

against B for money, as to which his co-defendants had no interest, and the motion to dismiss was overruled.<sup>61</sup> Precisely the same rule operates in equity and admiralty as at law.<sup>62</sup>

In a celebrated case, to which we have adverted in another connection, assignees in bankruptcy filed a bill to set aside, as fraudulent, a number of deeds to various defendants. C and D were interested only in specific deeds, under which the other defendants claimed no interest. C and D appealed alone, and the Court held that as to their interests the decree was several, and no severance was necessary.<sup>63</sup>

§ 13. **Summons and Severance.**—Where his interests under the judgment or decree are not severable and distinct, a co-plaintiff (or co-defendant), before suing out alone his writ of error or appeal, must ordinarily resort to summons and severance, or an equivalent proceeding. The remedy of summons and severance (apart from similar statutory provisions sometimes found) has fallen into desuetude, save in cases of appeal and error. It was formerly allowed in certain common-law actions, where more than one person was jointly interested in a cause of action, and one of those jointly concerned refused to join in the vindication of the common right; in which case the other sued out a writ of summons, by which the recalcitrant was brought before the court, and an order of severance made, the effect of which was to bar him and permit the others to sue alone.<sup>64</sup>

<sup>61</sup> *Germain v. Mason*, 12 Wall. 259; Cf. *Brewster v. Wakefield*, 22 How. 118.

<sup>62</sup> *Todd v. Daniel*, 16 Pet. 521; *Forgay v. Conrad*, 6 How. 201; *Owings v. Kincannon*, 7 Pet. 399; *Basket v. Hassell*, 107 U. S. 602; *Sheldon v. Clifton*, 23 How. 481; *Hardee v. Wilson*, 146 U. S. 179; *Beardsley v. Arkansas, Etc., Ry. Co.*, 158 U. S. 123.

<sup>63</sup> *Forgay v. Conrad*, 6 How. 201; Cf. *Gillfillan v. McKee*, 159 U. S. 303.

<sup>64</sup> Cf. *Bacon's Abridgment*; "Summons and Severance;" *Mastersson v. Howard*, 10 Wall. 416.

I have been unable (with the books at my command) to lay hands upon common-law entries setting out the form of this writ and the order pursuant thereto; but it is unusual to follow the technical details of the ancient practice (if, indeed, it be entirely applicable) in the federal courts. A writ of error or appeal sued out by one of joint co-plaintiffs or defendants will be held good, provided it appears from the record that the others have been duly notified in writing to appear (for the purpose of joining in the application) and that they have failed to appear, or, appearing, have refused to join.<sup>65</sup>

In the absence of local rule the usual procedure is for the proposed appellant or plaintiff in error to address a notice to his co-parties, requesting them to appear on (or by) a given day, and join in suing out error; in default of which he will proceed alone. After service, this notice (with the evidence of service) is filed with the clerk of the trial court. Thereupon the appellant or plaintiff in error files his motion for severance, setting out the notice, service and refusal or failure to join. Under local rule in this district (Rule 15) ten days' written notice must be given to co-parties or their counsel, that at a stated time and place application will be made for a severance. This notice may be given by mail (which is contrary to the general rule) and proof thereof made by affidavit. Neglect or refusal on the part of such co-parties to join, entitles the applicant to a severance and an order granting a writ of error as to his interests. We are also in the habit of reciting these proceedings in the bill of exceptions; but this seems a strange repository for such matters.<sup>66</sup>

The main purpose of summons and severance (or its equivalent) is to bar those not joining, so that the Appellate Court will not be obliged to re-examine, upon successive appeals or writs of error, the same questions; and the order granting the

<sup>65</sup> *Masterson v. Howard*, 10 Wall. 416; *O'Dowd v. Russell*, 14 Wall. 402; *Inglehart v. Stansbury*, 151 U. S. 1. c. 72; *Hardee v. Wilson*, 146 U. S. 179.

<sup>66</sup> Cf. *Loveless v. Ransom*, 107 Fed. 626, 1. c. 627.

severance, having such far-reaching effects, ought to be made or considered a matter of record.<sup>66a</sup>

While the Supreme Court has never (so far as I can discover) passed upon the matter, there is authority in the lower federal courts for the statement, that where non-joining parties are present, in open court, at the time an appeal or writ of error is sued out, during the judgment term, and make no objection, this is equivalent to summons and severance;<sup>67</sup> and some cases even apply to appeals the doctrine of constructive presence.<sup>68</sup> Where the interests of a party cannot be affected by the affirmance or reversal of the judgment below, such a party is unnecessary and may be disregarded.<sup>69</sup>

§ 14. **Persons Who May Appeal or Bring Error.**—A judgment or decree does not bind or conclude in any way the rights of those not parties, in person or by representation.<sup>70</sup> Persons whose rights are not bound are usually not entitled to insist upon review. The ordinary statement of the rule is, that one who is not a *party* to the record and judgment is not entitled to sue out error to take an appeal.<sup>71</sup>

If persons concluded by representation (*privies*) may sue out error or appeal, *without* having been, expressly or impliedly, admitted as *parties* to the record, instances of this sort are difficult to find in the federal digests.<sup>72</sup>

<sup>66a</sup> *Inglehart v. Stansbury*, 151 U. S. 68.

<sup>67</sup> *Loveless v. Ransom*, 107 Fed. 626; *Johnson v. Trust Co.*, 104 Fed. 174; *City of Detroit v. Guaranty Trust Co.*, 168 Fed. l. c. 611.

<sup>68</sup> *Kidder v. Fidelity Insurance Co.*, 105 Fed. 821; *King v. Thompson*, 110 Fed. 319; *McNulta v. West Park Commissioners*, 99 Fed. 328.

<sup>69</sup> *Basket v. Hassel*, 107 U. S. 602.

<sup>70</sup> *Sessions v. Johnson*, 95 U. S. 347.

<sup>71</sup> *Taylor v. Savage*, 1 How. 282; *Bayard v. Lombard*, 9 How. 530; *Connor v. Peugh*, 18 How. 394; *Payne v. Niles*, 20 How. 219; *Ex parte Cutting*, 94 U. S. 14; *Ex parte Cockroft*, 104 U. S. 578; *Indiana, Etc., Ry. Co. v. Ins. Co.*, 109 U. S. 168; *In re Leaf Tobacco Board*, 222 U. S. 578; *U. S. ex rel. Louisiana v. Boarman*, 217 Fed. 757.

<sup>72</sup> Cf. *Bayard v. Lombard*, 9 How. l. c. 551; *Green v. Watkins*, 6 Wheat. 260; *Taylor v. Savage*, 1 How. 282; *Buel v. Farmers' Loan, Etc., Co.*, 104 Fed. 839; *Andrews v. Thum*, 64 Fed. 149; *Sage v. Central R. R. Co.*, 93 U. S. 412.

A person may be made a technical party by amendment; or he may be allowed to intervene and become a party by formal order allowing intervention; or he may be treated as a party, without any formal order making him such, as where he files pleadings and asserts rights which are contested and passed upon. We must remember, too, that when we speak in the general rule of a party to the record and judgment, we mean by the word *judgment* any order or adjudication final in essence as to the rights of the persons appearing by the record to be parties to the particular controversy, to the settlement of which the order or adjudication is directed. Under the doctrines laid down in our discussion of final judgments, as to such a controversy, persons may be regarded as parties, having the right to appeal or sue out error, though not named in the pleadings at all as technical parties.

The instances of this sort are so numerous as to defy exhaustive recital. A few examples must suffice: The successful bidder at a sale by the master is entitled to be heard upon a motion to confirm or to set aside. As to this controversy, he has rights and is to be regarded to that extent at least as a party; and he may appeal from an adverse decision.<sup>73</sup> The unsuccessful intervenor *pro interesse suo* in an attachment proceeding, whose claims are heard and disallowed, may have a writ of error to review that determination;<sup>74</sup> and precisely the same rule applies as to appeal upon an intervention *pro interesse suo* in equity, upon hearing and disallowance of the claim set up.<sup>75</sup> So in the case of *Hinckley v. R. R. Co.*, a receiver was allowed to appeal from a decree ordering him to pay a sum of money into court in the cause wherein he is receiver;<sup>76</sup> and many other instances will be recalled by you, from preceding discussions.

In all such cases the situation of the persons affected makes

<sup>73</sup> *Blossom v. Milwaukee, Etc., R. R. Co.*, 1 Wall. 655; *Magann v. Segal*, 92 Fed. 252.

<sup>74</sup> *Gumbel v. Pitkin*, 113 U. S. 545.

<sup>75</sup> *Savannah v. Jesup*, 106 U. S. 563.

<sup>76</sup> 94 U. S. 467.



**§ 14 JURISDICTION AND PRACTICE OF FEDERAL COURTS.**

them quasi-parties to the cause, and they are in effect actual parties to the particular adjudication, which constitutes a branch or offshoot from the main cause, but is still organically a part thereof."<sup>77</sup>

A person, not a party below, may, however, be permitted to be heard in the Appellate Court, at the Court's discretion.

<sup>77</sup> Cf. *Williams v. Morgan*, 111 U. S. 684.

## CHAPTER XXII.

### APPELLATE PROCEDURE, LAW AND EQUITY— CONTINUED.

- § 1. The Assignment of Errors.
- 2. Their Definiteness.
- 3. Bond—Supersedeas.
- 4. The Amount of the Bond—No Bond from U. S.
- 5. Citation—Waiver.
- 6. Citation on Appeal.
- 7. The Rules as to Citation in *Jacobs v. George*.
- 8. Service of Citation—What Judge Should Sign.
- 9. Issuance and Service of Writs of Error.
- 10. Limitation of Time—"Taken" or "Sued Out."
- 11. The Transcript—Law and Equity—Docketing—Dismissal for Failure.
- 12. Extreme Limitations for Filing Transcript—Entry of Appearance.
- 13. The Transcript—"Old" and "New" Methods.

§ 1. **The Assignment of Errors.**—According to the requirement of statute (as amplified and explained by rules of court) the appellant or plaintiff in error should file, with his petition for the writ of error or appeal, an assignment of errors, with a prayer for reversal;<sup>1</sup> and the rules declare that no writ of error or appeal shall be allowed until such assignment of errors shall have been filed.

Nevertheless, the requirement is not strictly jurisdictional, because the rules permit the Appellate Court, at its option, to notice plain errors not assigned.<sup>2</sup> Because of this option, I think it may be stated that the failure to file assignments of error will not necessarily result in a dismissal of the

<sup>1</sup> R. S. 997; Rule 35, Supreme Court; Rule 11, C. C. A.

<sup>2</sup> *Ibid*; *Gumbel v. Pitkin*, 113 U. S. 545; *Rowe v. Phelps*, 152 U. S. 87; *Old Nick Williams v. U. S.* 215 U. S. 541; *Columbia Heights, Etc., Co. v. Rudolph*, 217 U. S. 547; *Holmgren v. U. S.*, 217 U. S. 509; *Paralso v. U. S.*, 207 U. S. 368; *New York Life Ins. Co. v. Rankin*, 162 Fed. 103; *Baltimore, Etc., R. R. Co. v. McCune*, 174 Fed. 991.

## § 2. JURISDICTION AND PRACTICE OF FEDERAL COURTS.

case, either in the Supreme Court or the Courts of Appeals.<sup>3</sup> The Eighth Circuit has manifested, however, under its rules, a strong tendency to dismiss for such failure.<sup>4</sup> Where no assignment has been filed, counsel for appellant or plaintiff in error has no *right* to be heard.<sup>5</sup>

The philosophy underlying the requirement would seem to be to limit artificially the possible reversal for errors which may be discovered by later study, but which made no impression upon counsel and so presumptively did not affect the result; and especially to enable the Court and opposing counsel to see upon what points appellant or plaintiff in error intends to ask reversal, and to confine the discussion to those points.<sup>6</sup> The requirement is not satisfied by assignments of error in the brief.<sup>7</sup>

§ 2. **Their Definiteness.**—These charges or assignments of error must be much more definite and precise than the ordinary motion for new trial in our state courts, and each error intended to be urged must be *separately* and particularly set out. Technically, they should be sufficiently precise to enable the Court, *ex conspectu*, without the necessity for extraneous resort or explanation, to see what questions they are called upon to decide.<sup>8</sup>

When the admission or rejection of evidence is complained of, the assignment is required to quote the *full substance* of the evidence admitted or rejected; and when the charge of

<sup>3</sup> *School District v. Hall*, 106 U. S. 428; *U. S. v. Pena*, 175 U. S. 500; *Hultberg v. Anderson*, 203 Fed. 853; *Farrar v. Churchill*, 135 U. S. 609; *U. S. v. Tenn., Etc., R. R.*, 176 U. S. 243; *Briscoe v. Rudolph*, 221 U. S. 1. c. 550; *Central, Etc., Co. v. Cambria Steel Co.*, 201 Fed. 811; *U. S. v. Bernays*, 158 Fed. 792; *The Myrtle M. Ross*, 160 Fed. 19.

<sup>4</sup> *Frame v. Portland, Etc., Mining Co.*, 108 Fed. 750; *Weber v. Mihilis*, 124 Fed. 64; *Lockman v. Lang*, 128 Fed. 279.

<sup>5</sup> Rule 35, Supreme Court; Rule 11, C. C. A.

<sup>6</sup> Cf. *Phillips v. Seymour*, 91 U. S. 646.

<sup>7</sup> *Briscoe v. Rudolph*, 221 U. S. 1. c. 551.

<sup>8</sup> Cf. *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 63 Fed. 891; *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 517; *Van Gunden v. Coal & Iron Co.*, 52 Fed. 838.

the Court is in question, the assignment must set forth the parts or part referred to, *in totidem verbis*, whether in the instructions given or refused.<sup>9</sup> Illustrating the particularity required, the following instances may be referred to where the assignment was held insufficient: (a) That the Court erred in the instructions given to the jury, without setting out the parts of the charge aimed at, in full;<sup>10</sup> that the Court erred in the instructions given to the jury in lieu of those requested;<sup>11</sup> that the Court erred "in adopting the theory announced throughout the instruction for the defendants, that the transaction could not amount to a mortgage unless there was a personal liability, and in giving conflicting instructions on said matter;"<sup>12</sup> (b) that the Court erred in admitting any evidence in the case, without specifying wherein the evidence was improper or irrelevant;<sup>13</sup> that the Court erred in excluding competent evidence, without setting forth what the evidence was;<sup>14</sup> that the Court erred in excluding a document without setting forth its substance.<sup>15</sup>

It is further involved in the word "separately" under the rule, that assignments should each be directed to a single point; and that no specification should set forth more than one distinct exception.<sup>16</sup> Where, however, the errors complained of all go to a single point or proposition of law, common to all, there would seem to be no objection to a grouped assignment.<sup>17</sup>

<sup>9</sup> Rule 35, Supreme Court; Rule 11, C. C. A.

<sup>10</sup> *Prichard v. Budd*, 76 Fed. 710.

<sup>11</sup> *Lucas v. Brooks*, 18 Wall. 436.

<sup>12</sup> *Bogk v. Gassert*, 149 U. S. 17.

<sup>13</sup> *Van Stone v. Stillwell*, 142 U. S. 128.

<sup>14</sup> *Shauer v. Alerton*, 151 U. S. 607; *Smith v. Hopkins*, 120 Fed. 921; *Sladen v. New York Life Co.*, 86 Fed. 102.

<sup>15</sup> *Atlas Co. v. Rheinstrom*, 86 Fed. 244; *Crosby v. Emerson*, 142 Fed. 713; *Northwestern Co. v. Great Lakes Co.*, 181 Fed. l. c. 45.

<sup>16</sup> *U. S. v. Indian Grave District*, 85 Fed. l. c. 931, 932; *Davidson v. U. S.*, 142 Fed. 315; *Cf. Vlder v. O'Brien*, 62 Fed. 326; *Clarke v. Deere, Etc., Co.*, 80 Fed. 534.

<sup>17</sup> *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 517; *Andrews v. Pipe Co.*, 76 Fed. 170.

§ 3. **Bond—Supersedeas.**—According to the requirement of statute, the appellant or plaintiff in error should give, upon the allowance of his appeal or writ of error, a bond with good and sufficient security, to be approved by the judge or justice signing the citation. This bond may secure simply the payment of all costs, in which event the appeal or writ of error will not operate as a *supersedeas*; or it may be conditioned that the appellant or plaintiff in error shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, so as to constitute a *supersedeas*.<sup>18</sup>

The giving of a bond, upon the allowance of an appeal or writ of error, is not jurisdictional; and where no bond or a defective bond has been given, the Appellate Court may (and usually will) permit the appellant or plaintiff in error to supply the omission, if the application be brought to its attention within a reasonable time.<sup>19</sup> The security is merely essential to the due *prosecution* (rather than the taking or suing out of the writ of error or appeal.<sup>20</sup> It is not even necessary that the bond be given within two years after the rendition of the decree,<sup>21</sup> but unreasonable delay will defeat the privilege of supplying the omission.<sup>22</sup> The later statutes also provide for the allowance and prosecution of error and appeal *in forma pauperis*.<sup>23</sup>

The question of *supersedeas* is of especial importance.

<sup>18</sup> R. S. 1000.

<sup>19</sup> Davidson v. Lanier, 4 Wall. 447; Union Pac. Ry. Co. v. Callaghan, 161 U. S. 91; Seymour v. Freer, 5 Wall. 822; Edmonson v. Bloomshire, 7 Wall. 306; Providence Rubber Co. v. Goodyear, 6 Wall. 153; Peugh v. Davis, 110 U. S. 227; Evans v. Bank, 134 U. S. 330; Brown v. McConnell, 124 U. S. 489; Dodge v. Knowles, 114 U. S. 436; Farmers' L. & T. Co. v. R. R. Co., 73 Fed. 314; Walker v. Houghteling, 104 Fed. 513; Herr v. St. Louis, Etc., Ry. Co., 174 Fed. 938; Corcoran v. Kostrometloff, 164 Fed. 685.

<sup>20</sup> Dodge v. Knowles, 114 U. S. 436; Brown v. McConnell, 124 U. S. 489.

<sup>21</sup> Evans v. State Bank, 134 U. S. 330.

<sup>22</sup> Beardsley v. Arkansas, Etc., Ry. Co., 158 U. S. 123.

<sup>23</sup> Act of June 25, 1910; 36 Stat. 866.

Section 1007 of the Revised Statutes provides, in the last sentence thereof, in effect, that in any case where a writ of error, if *immediately* sued out, might operate as a *superse-deas*, no execution can issue until the expiration of ten days from the rendition of the final judgment; thus affording a respite for the making of necessary arrangements.<sup>24</sup> Inas-much as the statute<sup>25</sup> provides that appeals are subject to the same rules and regulations as are or may be prescribed by law for writs of error, the same ten days' respite exists, in cases where an appeal, if immediately taken, might operate as a *supersedeas*.<sup>26</sup>

Apart from this automatic stay, in order to obtain a *super-sedeas*, which is a statutory remedy, the conditions prescribed by statute must be complied with. It is an absolutely indis-pensable prerequisite to its obtention, that the writ of error be sued out and served, or that the appeal be taken, within sixty days (exclusive of Sundays) after the *rendering* of the judgment complained of. If this be neglected, it will be im-possible to pluck from the adverse party the immediate fruits of his judgment.<sup>27</sup>

In calculating time, I suppose, according to the frequently inexact use of language by legislatures, that *rendering* means *entry* of the judgment.<sup>28</sup> At any time during such sixty-day period, the appellant or plaintiff in error may, as a matter of right in cases falling within the statute, take his appeal or sue out and serve his writ of error, and give security for

<sup>24</sup> Commissioners v. Gorman, 19 Wall. 661; Danielson v. North-western Fuel Co., 55 Fed. 49; Doyle v. Wisconsin, 94 U. S. 50; Kitchen v. Randolph, 93 U. S. 86.

<sup>25</sup> R. S. 1012.

<sup>26</sup> Cf. Danville v. Brown, 128 U. S. 503.

<sup>27</sup> R. S. 1007; Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. R. Co., 93 U. S. 412; Western Air Line v. McGillis, 127 U. S. 776; Title Guaranty, Etc., Co. v. U. S., 222 U. S. 401; Roberts v. Kendrick, 211 Fed. 970.

As to *nunc pro tunc* allowance, see statements in Sage v. Central R. R. Co., 93 U. S. 412; see also note 72, hereunder.

<sup>28</sup> Board of Commissioners v. Gorman, 19 Wall. 1. c. 664; Cf., how-ever, *In re McCall*, 145 Fed. 1. c. 901.

*supersedeas*; and such security may be given simultaneously with the taking of the appeal or the suing out of the writ, or at any time thereafter during the said period.<sup>29</sup> If he has sued out and served his writ of error or taken his appeal within such period, but has not given bond for *supersedeas*, he may, nevertheless, by the grace and favor of a judge or justice of the Appellate Court, be thereafter permitted to give the security required for *supersedeas*.<sup>30</sup>

There is some conflict in the cases as to whether the same judge who allows the writ or appeal and signs the citation, *must* take the *supersedeas* bond; but I incline toward the more liberal rule.<sup>31</sup> The security required for a writ of error must be taken by a judge; he cannot delegate the duty, imposed upon him by statute, to the clerk or a commissioner.<sup>32</sup> If a *supersedeas* be obtained after the issuance of an execution, it only stays further proceedings thereunder. It does not operate to undo what has already been accomplished by virtue thereof.<sup>33</sup>

§ 4. **The Amount of the Bond—No Bond from U. S.—** Rules of court provide a measure for the bond which is to effectuate a *supersedeas*. Where the judgment is for the recovery of money, not otherwise secured, the bond for *supersedeas* must be for the whole amount of the judgment, including just damages for delay and costs, and interest pending the stay; but where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, suits on mortgages, or where the property or the proceeds or a bond for the value thereof, is held in the control or custody of the court, the indemnity need only be sufficient to secure

<sup>29</sup> *Kitchen v. Randolph*, 93 U. S. 86; *Western Union Co. v. Eyser*, 19 Wall. 419.

<sup>30</sup> *Ibid*; R. S. 1007.

<sup>31</sup> *Brown v. N. W. Life Ins. Co.*, 119 Fed. 148; *Gay v. Hudson River, Etc., Co.*, 190 Fed. l. c. 821; Cf. *O'Reilly v. Edrington*, 96 U. S. 724; *Hudson v. Parker*, 156 U. S. 277.

<sup>32</sup> *O'Reilly v. Edrington*, 96 U. S. 724; *Haskins v. St. Louis, Etc., Ry. Co.*, 109 U. S. 106.

<sup>33</sup> *Commissioners v. Gorman*, 19 Wall. 661.

the sum recovered for the use and detention of the property, the costs of the suit, just damages for delay, and costs and interest pending the appellate review.<sup>34</sup>

The early history of the whole subject is discussed by a master of practice in *Hotel Co. v. Kountze*.<sup>35</sup>

It is provided by statute<sup>36</sup> that no bond can be required upon writ of error, appeal or other process, in cases brought up by the United States, or by direction of any department of the Government.

§ 5. **Citation—Waiver.**—In order to insure the notice and opportunity to be heard in the Appellate Court, which is a prerequisite in all jurisprudence to jurisdiction over the person, the statutes contemplate a *citation*, which is a written notification to the adverse parties, ordinarily signed by the judge allowing the writ of error or appeal, of its allowance; and admonishing them to appear in the Appellate Court, to which the writ of error or appeal is returnable, and show cause, if any they have, why the judgment or decree should not be reversed and set aside.<sup>37</sup>

The statute<sup>38</sup> says that in writs of error (and the same law is made applicable to appeals)<sup>39</sup> the adverse party must have at least thirty days' notice; but the meaning of this statute is merely that the appellee or defendant in error must have at least thirty days' notice before he can be compelled to go to a hearing.<sup>40</sup>

The rules of the Appellate Courts all require that writs of error and appeals and the citations thereon be made returnable not exceeding a stated number of days (generally thirty) from the day of signing the citation, whether the return-day

<sup>34</sup> Rule 29, Supreme Court; Rule 13, C. C. A.

<sup>35</sup> 107 U. S. 378.

<sup>36</sup> R. S. 1000-1001.

<sup>37</sup> R. S. Secs. 997, 998, 999, 1000.

<sup>38</sup> R. S. 999.

<sup>39</sup> R. S. 1012.

<sup>40</sup> *National Bank of Commerce v. Bank*, 99 U. S. 608; Cf. *Segrist v. Crabtree*, 127 U. S. 773.



fall in vacation or in term, and be served before the return-day.<sup>41</sup>

The citation is not jurisdictional as to the *cause*; and if jurisdictional at all, is so merely with respect to the *person* of the appellee or defendant in error.<sup>42</sup>

Not being strictly jurisdictional, it is the subject of waiver, express or implied; is waived by a general appearance in the Appellate Court;<sup>43</sup> and is sometimes declared to be waived by proof of equivalent notice.<sup>44</sup>

Theoretically, it might be said that the Appellate Court, in every case where it was possessed of the *cause*, might regard the statutes and rules respecting citation as purely directory, and issue such process in every case in the first instance, and at any time. Such an absolute disregard of regulations would result, of course, in their complete nullification. The Supreme Court has often dismissed writs of error and appeals where there appeared an unexplained failure to issue and serve citation.<sup>45</sup>

§ 6. **Citation on Appeal**—Where an appeal is allowed in open court, during the term at which the final decree was entered, and during that same term the security is approved in open court, there is no necessity for a citation. The allowance and perfection of the appeal are complete while the lower court (during the indivisible term) still retains (ordinarily) dominion over the record and the parties, who must take notice during that term of the public acts of the court.

<sup>41</sup> Rule 8, Supreme Court; Rule 14, C. C. A.

<sup>42</sup> *Sutherland v. Pierce*, 186 Fed. 783; *Martin v. Buford*, 176 Fed. 554; *Lehman v. Lang*, 132 Fed. 1; *Nome & Sinook Co. v. Ames*, 187 Fed. 928; Cf. *Atherton v. Fowler*, 91 U. S. l. c. 146; *Kitchen v. Randolph*, 93 U. S. 87; *Mattingly v. R. R.*, 158 U. S. 53; *Dodge v. Knowles*, 114 U. S. 436.

<sup>43</sup> *Richardson v. Green*, 130 U. S. 104; *Buckingham v. McLean*, 13 How. 150; *Aldrich v. Aetna Co.*, 8 Wall. 491; Cf. *Nome & Sinook Co. v. Ames*, 187 Fed. 928.

<sup>44</sup> *Goodwin v. Fox*, 120 U. S. 775; *U. S. v. Gomez*, 1 Wall. 690.

<sup>45</sup> *U. S. v. Phillips*, 121 U. S. 254; *Alviso v. U. S.*, 5 Wall. 824; *Bacon v. Hart*, 1 Black. 38; *Hewitt v. Filbert*, 116 U. S. 142.

At any rate, this is the only explanation I can give for the doctrine.<sup>46</sup> This is *not* the law as to citation upon writ of error.<sup>47</sup>

Whether or not a citation is necessary where the *appeal* is allowed in open court at the judgment term, but security is accepted during that term out of court, is not clear to me from the decisions; but I am strongly inclined to the opinion that citation is *necessary*.<sup>48</sup>

In the second place, it is clear that if the *appeal* is merely *allowed* in open court at the judgment term, but security is not furnished until after the term, citation is necessary. The appellee is not bound to presume, without citation, that the appeal will be diligently prosecuted.<sup>49</sup>

In the *third* place, it is of course plain that if the *appeal* be allowed after the judgment term, a citation is necessary.<sup>50</sup>

§ 7. **The Rules as to Citation in Jacobs v. George.**—Certain propositions are laid down in the ruling case of Jacobs v. George,<sup>51</sup> to which our attention, even at the risk of repetition, may be specifically directed. According to that case, where an appeal is allowed *after* the term at which the decree was entered, a citation is indispensable; *and if it is not issued and served before the end of the next ensuing term of the Appellate Court, and be not waived, the appeal becomes inoperative.*

There is thus affixed a positive limitation within which a

<sup>46</sup> Jacobs v. George, 150 U. S. 415; Brown v. McConnell, 124 U. S. 489; Sage v. Central R. R. Co., 96 U. S. 712.

<sup>47</sup> U. S. v. Phillips, 121 U. S. 254.

<sup>48</sup> Cf. Jacobs v. George, 150 U. S. 415; Richardson v. Green, 130 U. S. 104; Brown v. McConnell, 124 U. S. 489; Hewitt v. Filbert, 116 U. S. 142; Dodge v. Knowles, 114 U. S. 436; Chicago, Etc., R. R. Co. v. Blair, 100 U. S. 661; Sage v. Central R. R. Co., 96 U. S. 712.

<sup>49</sup> Jacobs v. George, 150 U. S. 415; Brown v. McConnell, 124 U. S. 489; Haskins v. St. Louis, Etc., Ry. Co., 109 U. S. 106; First Nat. Bank v. Omaha, 96 U. S. 737; Sage v. Central R. R. Co., 96 U. S. 712.

<sup>50</sup> Jacobs v. George, 150 U. S. 415; Radford v. Folsom, 123 U. S. 725; Hewitt v. Filbert, 116 U. S. 142; Chicago, Etc., Ry. Co. v. Blair, 100 U. S. 661.

<sup>51</sup> 150 U. S. 415.

citation can be issued and served, where the appeal is allowed after the term.<sup>52</sup> The same limitation has been applied to writs of error sued out after the term, where no citation has been issued.<sup>53</sup>

The second proposition laid down in *Jacobs v. George* is that where the appeal is allowed *at* the term of the decree, but not *perfected* (i. e., bond not given) until after the term, a citation is necessary to bring in the parties; *but if the appeal is docketed at the next ensuing term of the Appellate Court* (or the record reaches the clerk's hands seasonably and legal excuse exists for lack of docketing) *a citation may be issued by leave of the Appellate Court*; and it makes no difference that the time for taking the appeal has lapsed.<sup>54</sup>

It is plain from the last two cases cited that where the appeal is allowed *at* the term of the decree, and the record is filed during *the next ensuing term* of the Appellate Court, a citation may be issued after the lapse of several terms. In the absence of direct authority (so far as I can ascertain) I assume this rule to apply to writs of error as well.

The third proposition laid down in *Jacobs v. George* is that where the appeal is allowed at a term subsequent to that of the decree, a citation is necessary; *but it may be issued, properly returnable, even after the expiration of the time for taking the appeal, if the allowance was before.*

I take this to mean that where, for example, an appeal is allowed on the last day within the statute of limitations, a citation may be issued thereafter, returnable to the proper term.<sup>55</sup> This rule would seem to be equally applicable at law.<sup>56</sup>

<sup>52</sup> Cf. *Hewitt v. Filbert*, 116 U. S. 142; *Nazima Trading Co. v. Martin*, 164 Fed. l. c. 839; *West v. Irwin*, 54 Fed. 419; *Gray v. Mercantile Co.*, 138 Fed. l. c. 346; *Bloomington v. Watson*, 128 Fed. 268.

<sup>53</sup> *Pender v. Brown*, 120 Fed. 496.

<sup>54</sup> *Jacobs v. George*, 150 U. S. 415; *Hewitt v. Filbert*, 116 U. S. 142; Cf. *Mendenhall v. Hall*, 134 U. S. 559; *Richardson v. Green*, 130 U. S. 104.

<sup>55</sup> Cf. *Lockman v. Lang*, 132 Fed. 1; *Pooler v. Hyne*, 202 Fed. 194.

<sup>56</sup> Cf. *Altenberg v. Grant*, 83 Fed. 980; *Nome v. Ames*, 187 Fed. 928.

How far, beyond the rules indicated, the appellate or trial court, in cases of accident, excusable mistake or oversight, will disregard, or permit the repair of, a failure to promptly issue and serve citation, I shall not here undertake to investigate.

§ 8. **Service of Citation—What Judge Should Sign.**—With respect to the service of citation, it is not governed by state rules or practice. Ordinarily it should be personal on the adverse parties or their counsel of record. Service in the fashion prescribed by the equity rules in the case of subpoenas would doubtless be sufficient.<sup>57</sup>

Whether a citation is to be regarded as so far a *process* that it must be served by the Marshal, or by some person specially appointed, after the analogy of the 15th Equity Rule, has not been decided. The practice is usual, in this Circuit, to serve by any competent witness.

There remains a question as to who may allow the appeal or writ of error, or sign the citation.

Under the provisions of R. S. 999 the appeal or writ of error from the District Court to the Supreme Court may be allowed by a justice of the Supreme Court, or by a judge of such District Court. Supplementing this statute, Rule 36 of the Supreme Court declares that in all cases under Section 238 of the Judicial Code, the writ of error or appeal may be allowed, in term-time or vacation, by *any* justice of the Supreme Court, by *any* circuit judge assigned to the District Court, or by *any* district judge within his district, with power in such judge or justice to take proper security, sign citation, and grant stay or *supersedeas*, pending the writ of error or appeal. The genesis of this rule is referred to in the cases cited below;<sup>59</sup> and it is, for the most part, merely declaratory of pre-existing law.

No general rule, similar in purport, has been enacted by the Circuit Courts of Appeals;<sup>60</sup> but under Section 132 of the

<sup>57</sup> *Tripp v. Santa Rosa, Etc., Co.*, 144 U. S. 126.

<sup>59</sup> *Re Claassen*, 140 U. S. 200; *Hudson v. Parker*, 156 U. S. 277.

<sup>60</sup> Cf. Rule 35, Second and Eighth Circuits.

## § 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

Judicial Code (Act of 1891, Sec. 11; 26 Stat. 829) there would seem to be no doubt that a judge of the proper Circuit Court of Appeals could allow a writ of error, or an appeal, and exercise the other powers incident thereto.<sup>61</sup>

It would seem, too, that R. S. 999 would empower any judge of the particular District Court to make the order of allowance.

It has been said by the Supreme Court that the act of Congress requires the citation to be issued by the judge or justice who allows the appeal or writ of error;<sup>62</sup> but later judicial utterances deny this rule.<sup>64</sup>

§ 9. **Issuance and Service of Writs of Error.**—With respect to writs of error, the statute authorizes issuance by the clerk of the *district*, as well as of the *Appellate Court*.<sup>65</sup> In either event, it is equally the mandate of the superior to the inferior tribunal; and must be served by filing the *original* writ with the clerk of the court to which it is addressed.<sup>66</sup>

Where a *supersedeas* is required, the statute on that subject requires also that a *copy* (or copies) of the writ be lodged (within the time limited) in the clerk's office for the adverse party.<sup>67</sup> In this connection reference may be made to the cases cited in the succeeding section, as to the meaning of "*suing out*" or "*bringing*" a writ of error, or "*taking*" an appeal.

§ 10. **Limitation of Time—"Taken" or "Sued Out."**—As in every jurisprudence, positive limits are affixed to the right of review. It was *formerly* provided by Section 1008

<sup>61</sup> Cf. *Re McKenzie*, 180 U. S. 1. c. 550; *Tornanses v. Melsing*, 106 Fed. 775.

<sup>62</sup> *Insurance Co. v. Mordecai*, 21 How. 195.

<sup>64</sup> *Farmers' L. & T. Co. v. R. R. Co.*, 73 Fed. 314.

<sup>65</sup> R. S. 1004.

<sup>66</sup> *Brooks v. Norris*, 11 How. 204; *Mussina v. Cavazos*, 6 Wall. 355; *Mutual Life, Etc., Co. v. Phinney*, 178 U. S. 327; S. C. 76 Fed. 617; *Land Co. v. Howes*, 153 Fed. 163; *U. S. v. Lumber Co.*, 202 Fed. 700.

<sup>67</sup> R. S. 1007; *Railroad Co. v. Harris*, 7 Wall. 574; *O'Dowd v. Russell*, 14 Wall. 403; Cf. *Mutual Life, Etc., Co. v. Phinney*, 178 U. S. 327; S. C. 76 Fed. 617; *Contra: McCarley v. McGhee*, 108 Fed. 494.

of the Revised Statutes that no judgment, decree or order of the District Court in any civil action at law or in equity could be reviewed in the Supreme Court on writ of error or appeal, unless such writ of error was brought or appeal taken, within two years after the *entry* of such judgment, order or decree; with a saving of the limitation during infancy, insanity or imprisonment.

This has been recently shortened so as to require the application to be made within *three months*; and the new limitation applies equally to *certiorari* from the Supreme Court.<sup>68</sup>

Under this new act, there is no saving in favor of infancy, or other disability; and it is broad enough to apply to review of state court judgments, as well as judgments of the Courts of Appeals.

Section 11 of the Act of 1891<sup>69</sup> provides that no writ of error or appeal, by which any judgment, order or decree may be reviewed in the courts of appeals shall be *taken or sued out*, except within six months after the *entry* of the order, judgment or decree sought to be reviewed; provided that where a shorter time is particularly prescribed by law, such shorter limitation shall continue applicable.

There is no express saving in this act for infancy, insanity or imprisonment; but it may have been that this saving was one of the "provisions of law *now* in force regulating the methods and system of review" declared applicable to the Courts of Appeals. The point has never been adjudicated.

The words *brought* and *sued out*, as applied to writs of error are significant, not only in this, but in other connections. In the legal sense, a writ of error is not brought or sued out until it is filed in the court which rendered the judgment.<sup>70</sup>

<sup>68</sup> Act of Sept. 6, 1916, Sec. 6.

<sup>69</sup> 26 Stat. 829.

<sup>70</sup> *Brooks v. Norris*, 11 How. 204; *Scarborough v. Pargoud*, 108 U. S. 567; *Polleys v. Black River, Etc., Co.*, 113 U. S. 81; *Credit Co. v. Ark. Central R. R. Co.*, 128 U. S. 258; *Cincinnati, Etc., Co. v. Grand Rapids, Etc., Co.*, 146 U. S. 54; *Old Nick Williams Co. v. U. S.* 215 U. S. 541; *U. S. v. Baxter*, 51 Fed. 624; *Coal Co. v. Howes*, 153 Fed. 163.

§ 10 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

In similar fashion an appeal is not *taken*, until it is in some way presented to the court rendering the decree, so as to put an end to its apparent jurisdiction; which is said to be usually done by filing the petition and allowance of appeal, the appeal bond and the citation.<sup>71</sup>

In this connection, it is proper to remark that there are cases to the effect, that where the petition for allowance has been filed in time, but by oversight or neglect of the judge has not been acted upon, the judge may allow it *nunc pro tunc*, so that the date of the allowance relates back to the time of filing the petition, and tolls the limitation.<sup>72</sup> I can only say that this looks like stretching the *equity* of the statute, by regarding as done, what the judge *ought* to have done.

The statutes of limitation prescribe the *entry* of the judgment or decree as the initial point of the period.

By *entry* I understand to be meant what is said, namely, the date of that entry in the record of the court's proceedings, which constitutes the evidence of the final judgment.<sup>73</sup> Inasmuch as error or appeal lies only upon a *final* judgment, the date of the entry of an order, overruling a motion for new trial or rehearing duly filed and entertained, would be the commencement of the limitation for all purposes.<sup>74</sup> The day of entering the final judgment is excluded from the computation.<sup>75</sup>

The fact that the last day of the period falls on Sunday

<sup>71</sup> Credit Co. v. Arkansas Cent. R. R. Co., 128 U. S. 258; Farrar v. Churchill, 135 U. S. 609.

<sup>72</sup> U. S. v. Vigil, 10 Wall. 423; Randall v. Foglesang, 200 Fed. 741; Cardona v. Quinones, 240 U. S. 83; cf. Sage v. Central R. R. Co., 93 U. S. 412.

<sup>73</sup> Polleys v. Black River, Etc., Co., 113 U. S. 81; Cf. Provident Rubber Co. v. Goodyear, 6 Wall. 153.

<sup>74</sup> Memphis v. Brown, 94 U. S. 715; Texas, Etc., Ry. Co. v. Murphy, 111 U. S. 488; Kingman v. Western Mfg. Co., 170 U. S. 675; Louisville Trust Co. v. Stockton, 72 Fed. 1; Cf. also cases cited under Appeal and Error—Decisions Reviewable.

<sup>75</sup> Smith v. Gale, 137 U. S. 577; Randall v. Foglesang, 200 Fed. 742; But Cf. Marks v. N. P. Ry. Co., 76 Fed. 1. c. 943; Baxter v. Phillips, 219 Fed. 309.

does not protract the limitation;<sup>76</sup> and the customary rule applies, that when limitation has begun to run, no subsequent disability will avail to interrupt it.<sup>77</sup>

There are a number of special statutes prescribing various short periods of review for particular proceedings; into the details of which we cannot here enter.

**§ 11. The Transcript — Law and Equity — Docketing — Dismissal for Failure.**—It is provided by R. S., Sec. 997, that there shall be annexed to and returned with a writ of error for the removal of a cause, . . . “an authenticated transcript of the record.”

By Rule 8 of the Supreme Court the clerk below, in making return to the writ, must transmit a true copy of the record, and of the assignment of errors, and of all proceedings in the case, authenticated by his hand and the seal of the Court.

(a) In cases at law, in order to eliminate matters not essential for review, counsel for plaintiff in error must serve on the adverse party or his counsel, and file with the said clerk a *praecipe*, or written direction, designating the portions of the record to be incorporated in the transcript. If his adversary be of the opinion that such *praecipe* omits matters which ought to be included, he must, within ten days after service (unless his time be enlarged) file *his praecipe*, calling for the inclusion of such omitted matters.

Only those portions of the record so designated should be inserted by the clerk in making up the transcript.

(b) The same result may be arrived at more expeditiously by stipulation of counsel.<sup>77a</sup>

By the New Equity Rules, it is provided with respect to the record on appeal, as follows:

(a) Counsel for appellant must serve on the adverse party or his counsel, and file with the clerk a *praecipe*, designating the portions of the record to be incorporated into the transcript. If the adversary desire additional portions to be

<sup>76</sup> Johnson v. Meyers, 54 Fed. 417.

<sup>77</sup> McDonald v. Harvey, 110 U. S. 619.

<sup>77a</sup> Rule 8; Supreme Court.



§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

added, he must, within ten days after service (unless further time be allowed) file *his praecipe*, calling for such additional portions.

(b) So far as the *evidence* in equity is concerned, the procedure is somewhat assimilated to a joint bill of exceptions.

At or before the time the appellant files his *praecipe* (just aforesaid) he must prepare and lodge with the clerk a statement or condensation of the evidence he deems material to the decision of the questions presented by the appeal, using the narrative form, except where the court or judge allows a *verbatim* report of question and answer. He thereupon gives the adverse side ten days' notice of his intention, at a stated time and place, to apply to the court or judge for its approval.

During the said ten days (or within such further time as the court or judge may allow) the adverse party prepares his objections or proposed amendments, which he submits to the judge when the latter takes up appellant's statement for approval. The judge composes their differences, and when such statement is found to be true, complete and properly prepared, endorses thereon his approval. It is thereupon deposited in the clerk's office and becomes a part of the record for purposes of appeal.<sup>78</sup>

It is further provided by Rule 77, of the New Equity Rules, that an agreed statement of the case may be prepared, with the approval of the judge, setting forth the questions that arose and were decided below, and material for the determination of the appeal. Such agreed case, for the purposes of the appeal, supersedes all the rest of the record except the decree.

The rules of the various circuits vary so, in detail, in their provisions for making up the transcript that you will have to refer to the rules themselves.

When the matter to be incorporated therein is finally enunciated, the clerk makes out and sends up a typewritten transcript.

<sup>78</sup> Cf. *In re Equity Rule*, 222 Fed. 884.

By Rule 9 of the Supreme Court the plaintiff in error or appellant is required to docket the cause and file the record thereof with the clerk of said court by or before the return-day, whether it fall in vacation or term; but, for good cause shown, the judge or justice who signed the citation, or any justice of the Supreme Court, may extend such time by order *filed with the clerk of the Supreme Court*. Upon non-compliance with this rule, the adverse party may docket the cause and move for dismissal, upon producing a certificate showing the date of the allowance of the appeal or writ of error; or may docket the cause and file the record, and thereupon the cause stands for argument in due course.

By Rule 16 of the Circuit Courts of Appeals substantially the same provisions are laid down as in the Supreme Court, with respect to docketing, filing transcript and dismissal.

It is very important under these rules, that the appellant or plaintiff in error docket the cause and file his transcript in the Appellate Court, on or before the return-day of the citation, or within the time as extended.<sup>79</sup>

It is not usual to dismiss, however, where before the motion was made, the cause had been actually put upon the docket at the instance of the appellant, except as immediately hereafter observed.<sup>80</sup>

**§ 12. Extreme Limitation for Filing Transcript—Entry of Appearance.**—Suppose that the appellee or defendant does not move to have the case docketed and dismissed; how long will the appellant or plaintiff in error have within which to file his transcript and docket the cause?

In the absence of extreme circumstances, creating a strong equity in his favor, *he must, at the latest, file his transcript of the record on or before the last day of that term of the Appellate Court, next succeeding the taking of the appeal or the suing out of error*. With the end of that term, the writ

<sup>79</sup> Cf. *Wong Sang v. U. S.*, 144 Fed. 968.

<sup>80</sup> *West Chicago R. R. Co. v. Ellsworth*, 77 Fed. 664; Cf. *Equitable, Etc., Society v. Talbert*, 145 Fed. 338.

## § 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

of error is said, in all ordinary instances, to become *functus officio*, and the appeal to have spent its force.<sup>81</sup>

Where, however, the transcript has been, during the term aforesaid, deposited in its clerk's office, the jurisdiction of the Appellate Court is not lost by the lapse of the term; but the Court has discretionary power, thereafter, for good cause shown, to permit the cause to be docketed and heard.<sup>82</sup>

Upon the filing of the transcript, the counsel for appellant or plaintiff in error should enter his appearance.<sup>83</sup>

The record is thereafter to be printed under the supervision of the clerk of the Appellate Court.<sup>84</sup>

§ 13. **The Transcript—"Old" and "New" Methods.**—The method of filing and printing the transcript, set out in the foregoing paragraphs, is known as the "*old method*."

In 1911, Congress passed a law for the professed purpose of diminishing the costs of appeals and writs of error.<sup>85</sup>

This enactment is composed of two sections; the first applicable to appeals and writs of error returnable to the Circuit Courts of Appeals, and the second, to cases taken from the Courts of Appeals (or other courts having printed records) to the Supreme Court for review.

The first section provides, that in any case where the final judgment or decree is sought to be reviewed on appeal to, or writ of error from, a Circuit Court of Appeals, the appellant or plaintiff in error shall cause to be *printed* (under such rules as the lower court shall prescribe) and shall *file* in the office of the clerk of the Court of Appeals, *at least 20 days* before the cause is called for argument, not less than twenty-five printed transcripts of the *record* of the lower court, and of *such part or abstract of the proofs*, as the rules of such

<sup>81</sup> *Green v. Elbert*, 137 U. S. l. c. 621; *Evans v. State Bank*, 134 U. S. 330; *Richardson v. Green*, 130 U. S. l. c. 111; *Gould v. U. S.*, 205 Fed. 883; *Freeman v. U. S.*, 227 Fed. 732.

<sup>82</sup> *Green v. Elbert*, 137 U. S. 615; *Edwards v. U. S.*, 102 U. S. 575.

<sup>83</sup> Rule 9, Supreme Court; Rule 16, C. C. A.

<sup>84</sup> Rule 10, Supreme Court; Rule 23, C. C. A.

<sup>85</sup> 36 Stat. 901.

Appellate Court may require, and in such form as the rules of the Supreme Court may prescribe;<sup>86</sup> and one of such printed copies must be certified under the hand of the clerk of the lower court and the seal of such court.

The adverse party must be served, at least *twenty days*<sup>87</sup> before the argument, with three copies. The lower or Appellate Court may order any original document or other evidence to be sent up, in addition to the printed transcript, or in lieu of a portion thereof.

Under our local rules, a prompt election is required to be filed in the lower court, as to whether the old method or the new is to be pursued in the preparation of the transcript.

This first section of the act is (so far as I am aware) universally regarded as conferring a mere *option*, to be availed of or not, as the appellant or plaintiff in error desires. In the Seventh and Eighth Circuits, at least, the old method is more usually adhered to.

The second section of the act is limited, as above indicated, and is beyond our present scope and purpose.

<sup>86</sup> Note.—With respect to the *20 days'* time spoken of, your circuit and local rules should be consulted.

<sup>87</sup> See note, *supra*.

## **CHAPTER XXIII.**

### **DECISIONS OF STATE COURTS—FEDERAL REVIEW.**

- § 1. **The Statute—Amendments—Review.**
- 2. **What Judgments are Final.**
- 3. **The Judgment Must be of the Highest State Court Where  
Decision Could be Had.**
- 4. **"Drawn in Question" and "Specially Set Up."**
- 5. **The Difference Attempted to be Explained.**
- 6. **Obscuration of Distinction—Question Decided Below.**
- 7. **Motion for Rehearing.**
- 8. **Further Obscuration.**
- 9. **How Questions Must be Raised—State Practice. Effect of  
Certificate.**
- 10. **Federal Question Must be Substantial.**
- 11. **Must be Controlling.**
- 12. **The Scope and Reach of the Writ of Error.**
- 13. **Validity, Rather Than Construction—"Authority."**
- 14. **Reason for Certiorari.**

§ 1. **The Statute — Amendments.** — It was provided by Section 237 of the Judicial Code (which had been Section 709 of the Revised Statutes) as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision of the suit could be had, (1) where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; (2) or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; (3) [or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority:]

may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.”

By recent amendments,<sup>1</sup> the *third* clause (3) has been cut out of the foregoing section, as shown by the bracketed portions [—], and the following added:

“It shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination with the same power and authority, and with like effect, as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had, (1) where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or (2) where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or (3) where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority.”

By the amendments two very important changes are made: (1) It is now possible to obtain review under clauses (1) and (2) of the old section, even where the federal claim is fully sustained. (2) It is no longer possible to take up cases falling within the *third* clause of the old section, by

<sup>1</sup> Act of Dec. 23, 1914 (38 Stat. 790), Act of Sept. 6, 1916.

writ of error; but a writ of *certiorari*, or similar proceeding (as may be prescribed by the court) lies to review such cases, whether the decision in the state court be for or against the privilege or immunity asserted.

The methods of *certiorari* to be employed are quite similar to that used to review final decisions of the Circuit Courts of Appeals.

I do not think there was any intention to change the *meaning* of these three clauses; and, proceeding upon that assumption, I shall take up and analyze them as they heretofore stood and were discussed by the courts.

§ 2. **What Judgments are Final.**—The first words are “a final judgment or decree.” Speaking generally, our former explication of these terms is applicable here; and the authorities relating to error to state courts are cited quite indiscriminately in cases of appeals and writs of error from the inferior federal courts.

It is difficult, however, to find in the former class of cases clear instances of fragmentation, of which *Forgay v. Conrad* is the type.<sup>2</sup>

The Supreme Court has for a considerable time been committed to the doctrine, that in determining whether or not a state judgment or decree is final, *the form of the judgment or decree is controlling*; and the rule is said to have been adopted for the purpose of avoiding the confusion and contradiction which would inevitably arise from resorting to the state laws for the purpose of converting a judgment not final on its face to one final in essence.<sup>3</sup>

There is, however, some authority to the effect that where the state courts fragmentate an apparently integral proceeding, as for example a suit for condemnation, into distinct suits or parts, the judgment in each of which is treated as

<sup>2</sup> Cf. *Carondelet, Etc., Co. v. La.*, 233 U. S. 362.

<sup>3</sup> *Louisiana Navigation Co. v. Oyster Commission*, 226 U. S. 99; *Schlosser v. Hemphill*, 198 U. S. 173; *Haseltine v. Bank*, 183 U. S. 130.

final in the state courts, the Supreme Court will so regard them for the purposes of error.<sup>4</sup>

A judgment of an appellate court, reversing and remanding the cause, for further proceedings consistent with the opinion, is not final;<sup>5</sup> the reason being that further *judicial* proceedings are contemplated below, as distinguished from the mere ministerial *execution* of the plain judgment of the Appellate Court.<sup>6</sup>

Illustrating the extent to which this rule is carried, the lower state court granted a petition for removal to the federal court; on appeal the State Supreme Court reversed this order and remanded the case; thereupon the lower court sustained a demurrer to the evidence; which, upon a second appeal to the State Supreme Court, was reversed and the cause remanded; whereupon the case was tried below, resulting in a judgment for plaintiff, which was affirmed by the State Supreme Court, upon the defendant's appeal. The federal question had been decided by the State Supreme Court on the first appeal, and in all subsequent proceedings it considered itself bound, as to the federal question, by that first decision and refused to reconsider it. Nevertheless, the *last* was the first *final* judgment which would support error to the Supreme Court of the United States.<sup>7</sup>

In avoiding Scylla, however, we must be careful not to run into Charybdis. Where the first judgment is final within the meaning of Section 237 of the Judicial Code—disposing of the whole case on the merits, directing what judgment should

<sup>4</sup> *Wheeling, Etc., Co. v. Bridge Co.*, 138 U. S. 287; *Southern Ry. Co. v. Telegraph Co.*, 179 U. S. 641.

<sup>5</sup> *Johnson v. Keith*, 117 U. S. 236; *Smith v. Adams*, 130 U. S. 167; *Rice v. Sanger*, 144 U. S. 197; *Brown v. Bank*, 146 U. S. 619; *Meagher v. Thresher Co.*, 145 U. S. 608; *Schlosser v. Hemphill*, 198 U. S. 173; *Haseltine v. Bank*, 183 U. S. 130.

<sup>6</sup> *California Bank v. Statler*, 171 U. S. 447; *Union, Etc., Co. v. Kirchoff*, 160 U. S. 374; *Haseltine v. Bank*, 183 U. S. 130; *Clark v. Kansas City*, 172 U. S. 334; *Schlosser v. Hemphill*, 198 U. S. 173.

<sup>7</sup> *Chesapeake, Etc., R. R. Co. v. McCabe*, 213 U. S. 207; *Great Western Tel. Co. v. Burnham*, 162 U. S. 339; *Coe v. Armour Co.*, 237 U. S. 413.



be entered, and leaving nothing below to *judicial discretion*, it makes no difference that a second appeal is taken, upon further proceedings in the trial court. A writ of error from the United States Supreme Court addressed to the judgment of the highest state court upon this second appeal, would bring up nothing for review.<sup>8</sup>

§ 3. **The Judgment Must be of the Highest State Court Where Decision Could be Had.**—Not only must the judgment or decree be *final*, but it must be rendered “in the highest court of a state in which a decision of the *suit* could be had.” As I read this language, so long as there remains in that *case* a possibility of *state* judicial action, upon *any* ground in *any* court, which may avert the necessity for federal interference, that possibility should be exhausted.<sup>9</sup>

This was popularly supposed to be the rule until the decision of the Supreme Court in the case of *Kentucky v. Powers*;<sup>9a</sup> wherein it was held, that if the *trial* court was *the highest court of the state in which a decision of the federal question could be had*, a writ of error would run to the trial court. Inasmuch as it was a deliberate and unanimous construction of the statute, and I do not find that the decision has ever been questioned or overruled, I assume it to be settled law.

Where, according to positive statute, no review thereof can be had, under any circumstances, the judgment of an inferior state court is necessarily final and the writ will lie;<sup>10</sup> but where an appeal or writ of error may be taken to a higher state court, by leave of a court or judge, it must be affirmatively shown upon the record that this recourse has been at-

<sup>8</sup> *Rio Grande, Etc., Co. v. Stringham*, 239 U. S. 44.

<sup>9</sup> *Gregory v. McVeigh*, 23 Wall. 294; *McComb v. Commissioners*, 91 U. S. 1; *Fisher v. Carrico*, 122 U. S. 522; *Great Western Tel. Co. v. Burnham*, 162 U. S. 339; *Mullen v. Western, Etc., Co.*, 173 U. S. 116.

<sup>9a</sup> 201 U. S. 1.

<sup>10</sup> *Cohens v. Virginia*, 6 Wheat. l. c. 376; *The Moses Taylor v. Hammons*, 4 Wall. 411; *Downham v. Alexandria*, 9 Wall. 659; *Miller v. Joseph*, 17 Wall. 655; *Gregory v. McVeigh*, 23 Wall. 294.

tempted and denied, before error will run to the inferior court.<sup>11</sup>

In the event an appeal or writ of error has been dismissed or denied by the highest state court for want of jurisdiction, the judgment of the inferior court is necessarily regarded as that of the highest state court in which a decision could be had;<sup>12</sup> but this statement, of course, assumes that there is no higher intermediate court to which the matter could be carried.

Where a state court of appeals is an intermediate appellate jurisdiction, and error thereto is refused by the Supreme Court of the state, the writ of error runs to the Court of Appeals.<sup>13</sup>

A difficulty has sometimes arisen in determining whether the action of the highest state court amounted to an affirmance or to a refusal to review. In *Western Union Co. v. Crovo*,<sup>14</sup> a state supreme court had refused a writ of error, being, as it declared, of the opinion that the judgment below was plainly correct. Was this an exercise of judicial power over the cause, or a refusal to consider at all?

Contrary to earlier cases,<sup>15</sup> the Supreme Court held in the *Crovo* case that it was a refusal to assume jurisdiction at all.

The matter was reviewed in *Norfolk, Etc., Co. v. Virginia*,<sup>15a</sup> where jurisdiction over the judgment of the State Supreme Court, under precisely similar circumstances, was very grudgingly retained; but the court served notice that thereafter they would confine themselves to the face of the record and resolve any ambiguity in the judgment of the Appellate Court of the state as a declination on the part of such court to assume jurisdiction.

<sup>11</sup> *Fisher v. Carrico*, 122 U. S. 522; *Mullen v. Western, Etc., Co.*, 173 U. S. 116; *Bergemann v. Backer*, 157 U. S. 655.

<sup>12</sup> *Lane v. Wallace*, 26 L. Ed. 703.

<sup>13</sup> *Stanley v. Schwalbey*, 162 U. S. 255; *Bacon v. Texas*, 163 U. S. 207; *Sullivan v. Texas*, 207 U. S. 416.

<sup>14</sup> 220 U. S. 364.

<sup>15</sup> *Williams v. Bruffy*, 96 U. S. 176.

<sup>15a</sup> 225 U. S. 264.

§ 4. “**Drawn in Question**” and “**Specially Set Up.**”—  
 “Where is *drawn in question*, etc.” It will be observed that this same language is used in the second clause of the section; whereas the third clause, dealing with a federal right, title or immunity, apparently limits the jurisdiction to cases where such right, title or immunity is “*especially set up or claimed.*”

It would seem, therefore, that to be “drawn in question” does not require that the right asserted should be “especially set up or claimed;” and that the latter requirement involves a particularity and definiteness of *expression* or *reference* that is not demanded by the former. In general, I think this is still theoretically true; although it is difficult to lay down with confidence comprehensive general propositions.

Taking up the meaning of “especially set up or claimed,” reference may be made to *Michigan Sugar Co. v. Dix*,<sup>16</sup> where the Supreme Court used the following language: “The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the third division . . . *cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right.* The statutory requirement is not met unless the party *unmistakably declares* that he invokes for the protection of his rights, the constitution, or some treaty, statute, commission or authority, of the United States.”

The following language is equally drastic: “The words ‘specially set up or claimed’ imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so *declare*; and, unless he does so *declare*, ‘specially,’ that is, *unmistakably*, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the pur-

<sup>16</sup> 185 U. S. 112.

pose of the party to assert a federal right is left to mere inference."<sup>17</sup>

Again: "There is no doubt that under the third class the federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction."<sup>18</sup>

In a case dealing with a federal right or immunity: "The general rule undoubtedly is that those federal questions, which are required to be specially set up and claimed, *must be so distinctly asserted below as to place it beyond question* that the party bringing the case here from the state court intended to and did *assert* such a federal right in the state court."<sup>19</sup>

"The *assertion* of the right must be made *unmistakably*, and not left to mere *inference*."<sup>20</sup> Much other language to the same general effect is found in the reports.

§ 5. **The Difference Attempted to be Explained.**—What, then, is the difference in meaning of the expression "drawn in question," as employed in the first and second clauses? I shall endeavor to let the court give its own explanation.

"The case is one of those frequently arising under the second clause . . . in which the validity of a state statute under the constitution of the United States is *necessarily drawn in question*, and the decision of the state court being in favor of its validity, this court will take jurisdiction, *though the federal question be not specially set up or claimed*. As we have repeatedly had occasion to hold, it is only in cases arising under the third clause of the section, where a right, title, privilege or immunity is claimed, that the federal question must be specially set up."<sup>21</sup>

"The assertion that, although no federal question was raised below, and although the mind of the state court was not

<sup>17</sup> F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648.

<sup>18</sup> Columbia Water Power Co. v. Electric Co., 172 U. S. 1. c. 488.

<sup>19</sup> Missouri, Etc., R. R. Co. v. Elliott, 184 U. S. 1. c. 533.

<sup>20</sup> Mutual Life Co. v. McGrew, 188 U. S. 1. c. 309.

<sup>21</sup> Yazoo, Etc., Ry. Co. v. Adams, 180 U. S. 1. c. 14.

directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless it is our duty to look into the record *and determine whether the existence of such a claim was not necessarily involved*, is demonstrated to be unsound by a conclusive line of authority. . . . The error involved in the argument arises from failing to observe that the particular character of federal right which is here asserted is embraced within those which the statute requires to be especially set up claimed.”<sup>22</sup>

“It has frequently been held that in cases coming within this class (the second), less particularity is required in asserting the federal right, than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity. In the latter class, the statute requires such right or privilege to be especially set up and claimed. *Under the second class*, it may be said to be the result of the rulings of this court, *that if the federal question appears in the record and was decided or the decision thereof was necessarily involved in the case*, the fact that it was not specially set up will not preclude the right of review here.”<sup>23</sup>

In *Columbia Water Power Co. v. Electric Co.*,<sup>23a</sup> the Court points out that in cases arising under the third clause, it has no jurisdiction unless the right or privilege be especially set up or claimed; then adds the following language: “But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question and the decision is in favor of its validity, this Court has repeatedly held that, *if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question*, the fact that it was not specially set up and claimed is not conclusive against a review of the decision here.”<sup>24</sup>

<sup>22</sup> *Eastern B. & L. Ass'n v. Welling*, 181 U. S. 47.

<sup>23</sup> *Harding v. Illinois*, 196 U. S. 1. c. 85.

<sup>23a</sup> 172 U. S. 1. c. 488.

<sup>24</sup> Cf. *Bolln v. Nebraska*, 176 U. S. 1. c. 91.

Assuming the foregoing cases to be sound, it would seem not to be absolutely necessary that, under the first and second clauses, the particular federal right should be *particularly* and *expressly*, or unmistakably *invoked*; but that it is enough that the record will show, upon its examination, that the federal question was contained implicitly therein and was decided, or that such decision was, in necessary effect, involved in the judgment; whereas, in every case, a right under the third clause must appear by the record to have been “especially set up or claimed,” as that language has heretofore been explained.

§ 6. **Observation of Distinction—Question Decided Below.**—It would be idle to claim that the distinction just attempted will explain every case that can be found. The Supreme Court sometimes qualifies, in a harsh case, by indirection. Difficulty is added by the fact, that having established the distinction, the court, in a case arising under one class, will cite indiscriminately cases arising under other classes as authority for its present statement.

Furthermore, the distinction has been broken into and obscured by the express language, as well as by the holdings, of the court. Thus in *Missouri, Etc., R. R. Co. v. Elliott*,<sup>25</sup> after stating the general rule with respect to cases of the third class, the Court adds the following language: “But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character *that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court*, yet if the state court, in deciding the case, has actually considered and determined a federal question, although arising on ambiguous averments, then, *a federal controversy having been actually decided, the right of this court to review obtains . . . All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal . . .* And of course where it is shown

<sup>25</sup> 184 U. S. 1. c. 534.

## § 8 JURISDICTION AND PRACTICE OF FEDERAL COURTS

by the record that the state court considered and decided the federal question, the purpose of the statute is subserved." The foregoing language was used in dealing with a case of the third class.

In line with this qualification, it is my understanding that if the federal question, as such, has been treated as raised, and is considered and decided, by the state court, it is practically immaterial what showing the record makes as to the time and manner of its raising; and the more modern authorities to this effect seem to apply this rule to all three clauses.<sup>26</sup>

§ 7. **Motion for Rehearing.**—It is furthermore the law, that a federal question raised, after the final state judgment, by a motion for rehearing, which is refused without a decision of the matters set up therein, is insufficient to sustain federal review; but it is otherwise, apparently with respect to all three classes, if the motion for rehearing is considered on its merits and overruled; because the federal question has been treated as properly raised and thereby becomes involved in the final judgment.<sup>27</sup>

§ 8. **Further Obscuration.**—By way of further obliteration of distinction between the three classes, the following is

<sup>26</sup> *Home for Incurables v. New York*, 187 U. S. 155; *San Jose Land, Etc., Co. v. Ranch Co.*, 189 U. S. 177; *Montana v. Rice*, 204 U. S. 291; *Chambers v. Baltimore, Etc., R. R. Co.*, 207 U. S. l. c. 148; *St Louis, Etc., Co. v. Hesterly*, 228 U. S. 702; *Miedreich v. Lauenstein*, 232 U. S. 236; *North Carolina, Etc., Co. v. Zachary*, 232 U. S. l. c. 257; *Mallinckrodt v. Missouri*, 238 U. S. l. c. 49; *Rogers v. Hennepin County*, 240 U. S. l. c. 188.

<sup>27</sup> *Missouri, Etc., R. R. Co. v. Elliott*, 184 U. S. 530; *Cochran v. Arnaudet*, 199 U. S. 182; *McKay v. Kalyton*, 204 U. S. l. c. 463; *Barrington v. Missouri*, 205 U. S. 483; *Sullivan v. Texas*, 207 U. S. l. c. 422; *McCorquodale v. Texas*, 211 U. S. 432; *Waters-Pierce Co. v. Texas*, 212 U. S. 112; *Kentucky, Etc., Co. v. Kentucky*, 219 U. S. l. c. 158; *Forbes v. State Council*, 216 U. S. 396; *Illinois Central Ry. Co. v. Kentucky*, 218 U. S. 551; *Consolidated Turnpike Co. v. Norfolk Co.*, 228 U. S. l. c. 334; *Bowe v. Scott*, 233 U. S. 658; *Grannis v. Ordean*, 234 U. S. l. c. 392.

suggested: "Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question—" (*evidently meaning federal right or immunity*)—"was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly *deducible* from the record before the state court can be said to have disposed of such federal question by its decision."<sup>28</sup>

As I understand this language, it seems to warrant *inference* from the record, that a *particular* federal right or immunity must necessarily have been asserted so as to be involved in the issues to be decided; that the judicial mind was in effect exercised upon it; which would be tantamount to wiping out the distinction attempted between the third and the other clauses. The most frequent operation of this relaxation of the rule under the third class is in the case of a state judgment which is specifically relied upon, and which is denied the full faith and credit to which it is entitled.<sup>29</sup>

In dealing with the distinction as a whole, a student of the decisions must feel depressed, either with his own lack of comprehension, or with the failure of the court to stamp out, with unmistakable clarity, the lines of so vital a distinction.

**§ 9. How Questions Must be Raised—State Practice—Effect of Certificate.**—While, fundamentally, it is within the power of the Supreme Court of the United States to decide for itself whether a federal question is involved, it has adopted generally the holding that to raise a federal question under any of the clauses of Section 237, settled state practice should be observed; and if such practice has been disregarded, and

<sup>28</sup> Sayword v. Denny, 158 U. S. 180; Cf. Mutual Life Ins. Co. v. McGrew, 188 U. S. 1. c. 309; Seaboard Air Line v. Duvall, 225 U. S. 1. c. 487; Capital Nat. Bank v. Bank, 172 U. S. 425.

<sup>29</sup> Green v. Van Buskirk, 5 Wall. 307; Crapo v. Kelly, 16 Wall. 610; Huntington v. Attrill, 146 U. S. 657; Great Western Co. v. Purdy, 162 U. S. 1. c. 334; Mutual Life Co. v. McGrew, 188 U. S. 1. c. 311.



the highest state court has therefore, *bona fide*, refused to consider and decide the question, the Supreme Court will not review.<sup>30</sup>

The certificate of the state court or a judge thereof cannot be used to import into the cause a federal question not otherwise shown by the record to exist; but such a certificate may serve only to make definite and certain in that regard an existing indefiniteness and ambiguity in the record.<sup>31</sup>

Neither can assignments of error in the Supreme Court be resorted to for the purpose of adding to or enlarging the contentions made in, and actually or in effect, passed upon by the state court.<sup>32</sup>

Where a general reference is to some constitutional provision, as for example, due process of law, without specifying whether state or federal constitution is intended, and the reference is applicable to either, it will be presumed, against the jurisdiction, that the state constitution was referred to.<sup>33</sup>

It is unsafe to simply claim that a ruling, statute or proceeding is "contrary to the Constitution of the United States," because the attention of the judicial mind below cannot ordinarily be guided or directed to the consideration of the

<sup>30</sup> *Erie R. R. Co. v. Purdy*, 185 U. S. 148; *Layton v. Missouri*, 187 U. S. 356; *Hurlbert v. Chicago*, 202 U. S. 275; *Dill v. Ebey*, 229 U. S. 1. c. 207; *L. & N. R. R. Co. v. Woodford*, 234 U. S. 46; *Willoughby v. Chicago*, 235 U. S. 45; see, especially, *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 1. c. 308.

<sup>31</sup> *Parmalee v. Lawrence*, 11 Wall. 36; *Roby v. Colehour*, 146 U. S. 153; *Louisville & C. R. R. Co. v. Smith*, 204 U. S. 551; *Martin v. Trout*, 199 U. S. 1. c. 223; *Consolidated Turnpike Co. v. Norfolk Co.*, 228 U. S. 1. c. 334; *Seaboard Air Line v. Duvall*, 225 U. S. 481; *Cleveland, Etc., R. R. Co. v. Cleveland*, 235 U. S. 50.

<sup>32</sup> *Waters-Pierce Co. v. Texas*, 212 U. S. 112; *Mallors v. Commercial Loan Co.*, 216 U. S. 613; *Appleby v. Buffalo*, 221 U. S. 524; *Cleveland, Etc., Ry. Co. v. Cleveland*, 235 U. S. 50.

<sup>33</sup> *Farney v. Towle*, 1 Black. 350; *Consolidated Turnpike Co. v. Norfolk Co.*, 228 U. S. 326; *Bowe v. Scott*, 233 U. S. 658; *Kipley v. Illinois*, 170 U. S. 182.

matter intended by so vague a statement; nor ought the courts to be compelled to speculate upon what is referred to.<sup>34</sup>

§ 10. **Federal Question Must be Substantial.**—In all three clauses, the words “drawn in question” or “claimed” equally demand a real and substantial federal question. There must be something more than a bare and plainly unfounded assertion; otherwise every unsuccessful litigant might, by making formal averment of a federal right, vexatiously delay his adversary, speculate upon possible intermediate advantage, and overwhelm with idle clamor an already over-worked tribunal. It is not, of course, required that the claim of federal right be actually valid;<sup>35</sup> but it must be plausible on its face—have fair color of merit—raise an apparently substantial *question*.<sup>36</sup>

The rule applies here (just as on appeal from the District Courts) that what was once a burning and vital *question* may have been so conclusively settled by decision as to leave no room for real controversy, and consequently no basis for jurisdiction.<sup>37</sup>

Of course, the question involved must not be or have become merely a moot or abstract one; and if it is, the writ of error will be dismissed.<sup>38</sup>

<sup>34</sup> *Capital City Dairy Co. v. Ohio*, 183 U. S. 238; *Farney v. Towle*, 1 Black. 350.

<sup>35</sup> *Blythe v. Hinckley*, 180 U. S. 333.

<sup>36</sup> *Millinger v. Hartuppee*, 6 Wall. 258; *New Orleans v. Water Works Co.*, 142 U. S. 79; *Hamblin v. Western Land Co.*, 147 U. S. 531; *American Sugar Co. v. Louisiana*, 179 U. S. 89; *Wilson v. North Carolina*, 169 U. S. 586; *New Orleans Water Works Co. v. Louisiana*, 185 U. S. 336; *Iowa v. Rood*, 187 U. S. 87; *Sawyer v. Piper*, 189 U. S. 154; *Delmar Jockey Club v. Missouri*, 210 U. S. 324; *Consolidated Turnpike Co. v. Norfolk Co.*, 228 U. S. 596; *Wabash Ry. Co. v. Hayes*, 234 U. S. 86.

<sup>37</sup> Cf. *Equitable Life Ass'n Society v. Brown*, 187 U. S. l. c. 314; *King v. West Virginia*, 216 U. S. 92; *Deming v. Carlisle Packing Co.*, 226 U. S. 102; *Louisville, Etc., R. R. Co. v. Melton*, 218 U. S. 36; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123.

<sup>38</sup> *Little v. Bowers*, 134 U. S. 547; *California v. San Pablo, Etc., R. R. Co.*, 149 U. S. 308; *Mills v. Green*, 159 U. S. 651; *Castillo v. McConnico*, 168 U. S. l. c. 685; *Kimball v. Kimball*, 174 U. S. 158; *Codlin*

## § 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

In order to be substantial, the question must be raised by one whose own *personal* interests are actually and injuriously affected.<sup>39</sup>

§ 11. **Must be Controlling.**—In the next place, the federal question must be involved as *controlling*. That is to say, it is not enough to confer jurisdiction over the judgment of a state court, that the record shows a federal question was presented to that court for decision. It must (*affirmatively*) appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without (in effect) deciding it.<sup>40</sup>

It is corollary to the foregoing statement, that if the state judgment rests, *or may rest*, upon an independent state ground, sufficient to support it, the Supreme Court cannot revise the judgment.<sup>41</sup>

§ 12. **The Scope and Reach of the Writ of Error.**—The nature of a writ of error, as reaching only questions of law apparent upon the record, has already been explained. There seems little reason to doubt that its adoption as the organ for

*v. Kohlhausen*, 181 U. S. 151; *Tennessee v. Condon*, 189 U. S. 64; *American Book Co. v. Kansas*, 193 U. S. 49; *Richardson v. McChesney*, 218 U. S. 487.

<sup>39</sup> *Smith v. Indiana*, 191 U. S. 138; *Missouri v. Dockery*, 191 U. S. 165; *McCandless v. Pratt*, 211 U. S. 437; *Braxton County Court v. West Virginia*, 208 U. S. 192; *Marshall v. Dye*, 231 U. S. 250; *Wisconsin v. Frear*, 231 U. S. 616.

<sup>40</sup> *Brown v. Atwell*, 92 U. S. 327; *Murdock v. Memphis*, 20 Wall. 636; *State ex rel. v. Board of Liquidation*, 98 U. S. 140; *Chouteau v. Gibson*, 111 U. S. 200; *Adams County v. Burlington R. R. Co.*, 112 U. S. 123; *Detroit City Co. v. Guthard*, 114 U. S. 133; *New Orleans Waterworks Co. v. Sugar Co.*, 125 U. S. 18; *First Nat. Bank v. Estherville*, 215 U. S. l. c. 346; *Eustis v. Bolles*, 150 U. S. 361.

<sup>41</sup> *Klinger v. Missouri*, 13 Wall. 257; *Kennebec, Etc., R. R. Co. v. Portland, Etc., Co.*, 14 Wall. 23; *State v. Board of Liquidation*, 98 U. S. 140; *N. O. Waterworks Co. v. Sugar Co.*, 125 U. S. 18; *De Saussure v. Gaillard*, 127 U. S. 216; *Hopkins v. McLure*, 133 U. S. 380; *Dibble v. Bellingham, Etc., Co.*, 163 U. S. 63; *Allen v. Argimbau*, 198 U. S. 149; *Adams v. Russell*, 229 U. S. 353.

review of state judgments, whether at law or in equity, evinced an intention to limit the review by the historical scope of the writ. It is, therefore, the ordinary rule that findings of fact, by state courts, whether of law or equity, are not open to review.<sup>42</sup>

There are two apparent exceptions laid down to this rule. Where the evidence has been properly incorporated in the record, the Supreme Court may examine and review it (1) where a federal right has been denied as the result of a finding of fact which is shown by the record to be, as a matter of law, unsupported by evidence sufficient to sustain it; and (2) where findings of fact and conclusions of law as to a federal right are so involved and intermingled together as to make it necessary, in order to determine the federal question, to analyze the facts—so far, at least, as to determine whether what *purports* to be a finding of fact is in substance and effect a decision as to the law.<sup>43</sup>

It is further the law, with perhaps not more than a single exception, that upon a writ of error to a state court, the Supreme Court must confine itself to the federal questions specified in the statute and raised in the case; and cannot review, as could a general appellate tribunal, any questions of general or state law which do not affect the federal claim.<sup>44</sup>

<sup>42</sup> *Dower v. Richards*, 151 U. S. 658; *Egan v. Hart*, 165 U. S. 188; *Gardner v. Bonesteel*, 180 U. S. 362; *Bement v. Harrow Co.*, 186 U. S. 70; *Thayer v. Spratt*, 189 U. S. 346; *German Savings Society v. Dormitzer*, 192 U. S. 125; *Adams v. Church*, 193 U. S. 510; *Clipper Mining Co. v. Eli Mining Co.*, 194 U. S. 1. c. 322; *Chrisman v. Miller*, 197 U. S. 313; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Kerfoot v. Farmers Bank*, 218 U. S. 281; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655; Cf., however, *Republican River Bridge Co. v. Kansas, Etc., R. R. Co.*, 92 U. S. 315.

<sup>43</sup> *Kansas City, Etc., R. R. Co. v. Albers*, 223 U. S. 573; *Washington v. Fairchild*, 224 U. S. 510; *Creswill v. Grand Lodge*, 225 U. S. 1. c. 261; *Wood v. Chesebrough*, 228 U. S. 1. c. 678; *Northern Pacific R. R. Co. v. North Dakota*, 236 U. S. 1. c. 593.

<sup>44</sup> *Murdock v. Memphis*, 20 Wall. 590; *McLaughlin v. Fowler*, 26 L. ed. 176; *Myrick v. Thompson*, 99 U. S. 291; *Cornell University v. Fiske*, 136 U. S. 152; *Sauer v. New York*, 206 U. S. 1. c. 546; *Waters-Pierce Co. v. Texas*, 212 U. S. 86; *Central R. R. Co. v. White*, 238 U. S. 507.

## § 13 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

The exception to which reference was just made, is in cases where impairment is claimed of the obligation of a contract, by subsequent state legislation. In such a case the Supreme Court has paramount authority, upon its own judgment and responsibility, to determine for itself whether a contract existed, as claimed, and whether its obligation has been impaired by later enactment.<sup>45</sup>

Otherwise the state court might evade the prohibition by holding there was no such contract upon which it could operate.<sup>46</sup>

There is another *apparent* exception to this rule, in cases dealing with “an authority exercised under the United States.” The rule has been laid down that in such cases the Supreme Court may decide questions of local law for itself. The holding seems to me unjustifiable, and will be referred to in the next section.

§ 13. **Validity, Rather than Construction—“Authority.”**—Exhaustive review of the various clauses of Section 237 of the Judicial Code would require a large volume.

Let us observe, in the first place, that both the writ of error clauses deal with the *validity*, rather than the *construction* of treaty, statute or authority.

Taking up the *validity* of a treaty, that seems to me to involve, at most, two possible elements, both going to the proposition whether there was, originally, an effectual and binding international obligation. These two elements are: (1) whether or not the treaty was contrary to the constitution or fundamental law of the countries involved; and (2) whether it was concluded in accordance with due form, and by authorized national agencies.

<sup>45</sup> *Jefferson Bank v. Skelly*, 1 Black. 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Northwestern University v. People*, 99 U. S. 309; *Mobile, Etc., R. R. Co. v. Tennessee*, 153 U. S. 486; *Douglas v. Commonwealth of Kentucky*, 168 U. S. 488; *Stearns v. Minnesota*, 179 U. S. 1. c. 233; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 1. c. 556; *New York, Etc., Co. v. Subway Co.*, 235 U. S. 179.

<sup>46</sup> Cf. *Louisiana, Etc., Ry. Co. v. Behrman*, 235 U. S. 164.

Whether, for example, a treaty, once admittedly valid, has since been abrogated, or modified by later inconsistent treaties or legislation, seem to me to be clearly questions of *construction* or *existence*, rather than of *validity*.

If this reasoning be correct, it is manifest that such cases can very rarely arise; and when they do arise, may sometimes, by an established course of executive action, have become largely political questions.

The *validity* of a federal statute would seem, in all instances, to involve merely a question of the power of Congress<sup>47</sup> to enact it.

"The validity of . . . an authority exercised under the United States," is a difficult clause. It plainly presupposes the existence of an *authority* (ostensible, at least), just as the remainder of the clause presupposes the existence of a treaty or a statute.

It is with the *validity* of this *existing* authority, apparently derived from competent governmental power, that the statute purports to deal.<sup>48</sup>

The word *authority*, as used in this clause, has been compared with "commission" in the third clause; and it has been doubted whether *authority* means anything more than personal authority, such as is exercised by a public officer of the United States.<sup>49</sup>

It is necessary to distinguish between the *validity*, and the *erroneous* exercise of an authority;<sup>50</sup> as well as between the denial of the validity of an authority, and the denial of a title, right, privilege or immunity claimed under an authority.<sup>51</sup>

It should be especially observed that the Supreme Court holds that, in so far as the judgment of the state court, against the validity of an authority set up under the United States,

<sup>47</sup> *Baltimore, Etc., R. R. Co. v. Harris*, 130 U. S. 210; *Miller v. Cornwall R. R. Co.*, 168 U. S. 131.

<sup>48</sup> *Millinger v. Hartupee*, 6 Wall. 258.

<sup>49</sup> *Telluride Power Co. v. Rio Grande, Etc., Co.*, 175 U. S. 639.

<sup>50</sup> *U. S. v. Lynch*, 137 U. S. 280.

<sup>51</sup> *Baltimore, Etc., R. R. Co. v. Hopkins*, 130 U. S. 210.

necessarily involves the decision of a question of law, the Supreme Court of the United States has power to decide for itself that question of law, even though it depends upon local law or upon general principles.<sup>52</sup>

This decision seems to me plainly erroneous.

Nearly or quite all the cases, upon this particular phase, deal with the validity of authority exercised by federal officers, as such.<sup>53</sup>

The remainder of the section seems to me reasonably plain; and not to demand extensive explication of the various circumstances under which the superiority of federal over state rights is manifested.

§ 14. **Reason for Certiorari.**—There is no reason to suppose that the principles of review heretofore laid down will be, in any serious fashion, affected by the substitution of the writ of *certiorari* in the cases of the third class in the old statute, in the place of the writ of error.

This substitution was probably intended to compensate the Court, by making review in this class of cases *optional*; to counterbalance the increased labors imposed upon it by the previous extension of review to cases where the decision of the state court was in favor of the federal right asserted.

<sup>52</sup> Stanley v. Schwalbey, 162 U. S. 255; Cf. Cramer v. Wilson, 195 U. S. 408.

<sup>53</sup> Cf. Buck v. Colbath, 3 Wall. 334; Etheridge v. Sperry, 139 U. S. 266; McNulta v. Locheridge, 141 U. S. 327; South Carolina v. Seymour, 153 U. S. 353; Neilson v. Lagow, 7 How. 772; Smoot v. Heyl, 227 U. S. 518; Clough v. Curtis, 134 U. S. 361.

## CHAPTER XXIV.

### FEDERAL REVIEW OF STATE COURTS—THE PROCEDURE.

- § 1. The Writ of Error—Conformity With Federal Practice.
- 2. Must Be Allowed—By Whom.
- 3. Petition for Writ—Summons and Severance.
- 4. The Assignment of Errors.
- 5. The Allowance of the Writ.
- 6. The Citation.
- 7. The Bond.
- 8. Supersedeas—Limitation of Time.
- 9. Issue of Writ—To Whom Directed.
- 10. The Record and Transcript.
- 11. Summary of Procedure to Obtain Writ.
- 12. Review by Certiorari.

§ 1. **The Writ of Error—Conformity with Federal Practice.**—The laws of a state cannot, *proprio vigore*, control the jurisdiction or procedure of any federal court, except so far as they may be adopted by competent federal authority. In the matter of writs of error to state courts, there is no such adoption; and the whole subject is governed by federal statutes, and the rules and decisions of the Supreme Court. To a very complete extent, the practice heretofore laid down respecting writs of error to inferior federal courts is applicable; according to the provisions of Section 1003, of the Revised Statutes, reading as follows:

“Writs of error from the Supreme Court to a state court, in cases authorized by law, shall be issued *in the same manner, and under the same regulations, and shall have the same effect*, as if the judgment or decree complained of had been rendered or passed in a court of the United States.”

In dealing with this statute, Justice Miller used the following language:

“So the regulations here spoken of are manifestly the rules under which the writ is issued, served and returned; the no-



tice to be given to the adverse party, and time fixed for appearance, argument, etc. Another important effect of the writ and of the regulations governing it, is that when accompanied by a proper bond, given and approved within the prescribed time, it operates as a *supersedeas* to further proceedings in the inferior court. The word 'manner' also much more appropriately expresses the general mode of proceeding with the case, after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or *mandamus* to the court, and the progress of the case in the Appellate Court; as filing the record, docketing the case, time of hearing, order of the argument, and such other matters as are merely incidental to final decision by the court. *In short, the whole phrase is one eminently appropriate to the expression of the idea that these cases, though coming from state instead of federal tribunals, shall be conducted in their progress through the court, in the matter of the general course of procedure, by the same rules of practice that prevail in cases brought, under writs of error to the courts of the United States.*"<sup>1</sup>

The result is an astonishing paucity of decisions dealing, in terms, with the *practice* on writs of error to state courts.

Under these circumstances, this whole subject might be very summarily dismissed from further consideration; but because many young lawyers seem to feel themselves at sea upon this practice, we shall undertake its brief consideration: it being understood, that the authorities cited are to be eked out by more numerous decisions relating to writs of error to the District Courts.

That there may be no misunderstanding from the beginning, it may be stated that the general statutory provisions (apart from the Rules of the Supreme Court), are the following, and the following only: Section 237 (as amended) of the Judicial Code, and Sections 710, 997, 999, 1000, 1001, 1003, 1004, 1005, 1007, 1008, 1010, and 1011, of the Revised Statutes. The recent statute of September 6, 1916, shorten-

<sup>1</sup> *Murdock v. Memphis*, 20 Wall. 590.

ing the time for appeals, writs of error and *certiorari* to three months, is broad enough to include and does apparently include, state cases.

§ 2. **Must be Allowed—By Whom.**—Assuming, therefore, that a final judgment has been rendered in an appropriate state court, and that the decision is reviewable, under the provisions of Section 237 of the Judicial Code, at the instance of a proposed plaintiff in error, let us take up the successive steps in the transfer of the cause, by way of writ of error.

A writ of error (contrary to what I deem the better rule with respect to the inferior federal court) to a state court does not issue as of right. It is indispensable that it be *allowed* by some judge or justice empowered to allow it, and that the record in the Appellate Court show such allowance.<sup>2</sup>

It is the settled doctrine of the Supreme Court that the writ must be allowed by “the Chief Justice, or judge or chancellor of such (*state*) court, rendering the judgment or passing the decree complained of, or . . . a justice of the Supreme Court of the United States;” and unless so allowed, the writ will be dismissed.<sup>3</sup>

On the other hand, where the record shows allowance, not by the Chief Justice, but by a Presiding Judge, provided for by law in the absence or incapacity of the Chief Justice, the absence or incapacity of the Chief Justice being averred, the writ will be held good.<sup>4</sup>

Where the state court is composed of a single judge or chancellor, the writ is necessarily allowed by him.<sup>5</sup>

It is not usual, as a matter of consideration and convenience,

<sup>2</sup> *Twitchell v. Pennsylvania*, 7 Wall. 321; *Gleason v. Florida*, 9 Wall. 779; *Hartford Ins. Co. v. Van Duzer*, 9 Wall. 784; *N. W. Packet Co. v. Ins. Co.*, 20 L. ed. 463; 154 U. S. 588; *Butler v. Gage*, 138 U. S. 52.

<sup>3</sup> *Bartemeyer v. Iowa*, 14 Wall. 26; *Havnor v. New York*, 170 U. S. 408.

<sup>4</sup> *Butler v. Gage*, 138 U. S. 52; *Missouri Valley Co. v. Wiese* 208 U. S. 234.

<sup>5</sup> *Bartemeyer v. Iowa*, 14 Wall. 26.

### § 3 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

to make application to a justice of the Supreme Court, unless allowance has been denied by the proper state judge. In a close case, it has sometimes happened that counsel has applied to one justice after another, in an endeavor to convince them of the propriety of the issue of the writ.

Application for a writ of error to a state court cannot be made to the Supreme Court itself, except upon request of one of the justices, assented to by his associates.<sup>6</sup>

**§ 3. Petition for Writ—Summons and Severance.**—It is the customary practice to file a written petition for the allowance of the writ, with the clerk of the court rendering the judgment; and frequent references to such a petition are to be found scattered through the reports.<sup>7</sup>

Inasmuch as such a petition, for many purposes at least, is no part of the record below, it may be doubted whether the filing of a formal petition is indispensable;<sup>8</sup> but in matters of practice, the usual course is best.

This petition (being always accompanied by the assignment of errors) is frequently very brief. If you were always assured of your writ, it would not be necessary, I suppose, to set out the federal questions involved. Because judges dislike to peruse records for themselves, in such a matter, it is the part of wisdom to indicate briefly what federal rights have been violated, and how. I know of no binding decisions upon these questions; and form books are legion.<sup>9</sup>

Where the parties complaining of the judgment are plural, I understand that the same rules apply as to the necessity of summons and severance as we have heretofore discussed in dealing with error to federal courts. The test is, whether the

<sup>6</sup> *In re Robertson*, 156 U. S. 183; *Spies v. Illinois*, 123 U. S. 131; *Twitchell v. Pennsylvania*, 7 Wall. 321.

<sup>7</sup> Cf. (e. g.) *Warfield v. Chaffe*, 91 U. S. 690; *Felix v. Scharnweber*, 125 U. S. 54; *Butler v. Gage*, 138 U. S. 52.

<sup>8</sup> Cf. *Warfield v. Chaffe*, 91 U. S. 690; *Corkran Oil Co. v. Arnandet*, 199 U. S. 182.

<sup>9</sup> Cf. *Butler v. Gage*, 138 U. S. 52.

interest of the plaintiff in error, under the judgment, is several or joint with respect to his co-parties.<sup>10</sup>

The practice as to severance is indicated, though not with satisfactory fullness, in *O'Dowd v. Russell*,<sup>11</sup> but I assume that the notice to join, there spoken of, should be filed, with proof of service, in the office of the clerk of the state court. Inasmuch as the refusal to join may bar the rights of co-parties, it would seem that some finding or order *should* be made granting severance; otherwise the practice appears extraordinarily loose.<sup>11a</sup>

§ 4. **The Assignment of Errors.**—With this petition there must be filed an assignment of errors, with a prayer for reversal.<sup>12</sup> I have been able to find no evidence in the reports indicating that (pursuant to Section 1003 of the Revised Statutes) the requirements of Rule 35, as to the method of assignment (so far as applicable) do not apply to error from state courts in like manner as from federal. Inasmuch as the review in the Supreme Court is ordinarily limited to the federal questions, it would seem that the errors in that regard should be carefully and explicitly set forth; and that no other errors need to be or should be assigned, except as indicated in the preceding lecture.

§ 5. **The Allowance of the Writ.**—Upon such a petition (with the assignments of error) being filed and brought to the attention of the chief judge of the state court, it becomes his duty to examine the record and ascertain whether a federal question was raised by and decided against the petitioner, of the character reviewable by the Supreme Court; and in the event he so finds, to allow the writ.<sup>13</sup>

It is undoubtedly true that the state judge will generally

<sup>10</sup> *Simpson v. Greeley*, 20 Wall. 152.

<sup>11</sup> 14 Wall. 402.

<sup>11a</sup> *Inglehart v. Stansbury*, 151 U. S. 68.

<sup>12</sup> R. S. 997; Rule 35, Supreme Court; *Dugger v. Tayloe*, 121 U. S. 286.

<sup>13</sup> *Butler v. Gage*, 138 U. S. 52.

resolve a doubtful case in favor of the allowance;<sup>14</sup> but if he allow it, this does not fix or settle the question of jurisdiction, but the Supreme Court will determine for itself, upon the case being transferred to that court, whether the record justifies its retention and consideration, either upon motion being made to dismiss or at the hearing.<sup>15</sup>

As a practical matter, a *transcript* of the record of the state court must be exhibited to a justice of the Supreme Court, with the assignment of errors, and the application for allowance of the writ; and more careful scrutiny is customarily given by him, before he will grant a writ refused by the state judge. Where (as is very unusual)<sup>16</sup> application is made to the Supreme Court itself, the same standards are applied as on a motion to dismiss or affirm.<sup>17</sup>

§ 6. **The Citation.**—Section 997, R. S., requires a citation to the adverse party; and when a writ of error is issued to a state court, “the citation shall be signed by the chief justice, or judge, or chancellor of such (*state*) court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days’ notice.”<sup>18</sup>

Such a citation is customarily signed by the judge allowing the writ, and at the time of its allowance.<sup>19</sup> A citation signed by a U. S. District Judge, upon error to a state court is a nullity.<sup>20</sup> Inasmuch as there can be no such thing as an *appeal* to the Supreme from a state court,<sup>21</sup> I suppose a citation to be always a prerequisite to jurisdiction over the *person* of the adverse party, unless waived; and that the general

<sup>14</sup> Cf. *Callan v. May*, 2 Black. 541; *Hamilton v. Kneeland*, 1 Nev. 60.

<sup>15</sup> *Callan v. May*, 2 Black. 541.

<sup>16</sup> *In re Robertson*, 156 U. S. 183.

<sup>17</sup> *Ex parte Spies*, 123 U. S. 131.

<sup>18</sup> R. S. 999; Cf. *Gleason v. Florida*, 9 Wall. 779; *Seaboard Air Line v. Horton*, 233 U. S. 492.

<sup>19</sup> Cf. *Bartemeyer v. Iowa*, 14 Wall. 26.

<sup>20</sup> *Palmer v. Donner*, 7 Wall. 541.

<sup>21</sup> 10 Wall. 273.

doctrines heretofore discussed, with respect to citations upon writs of error to inferior federal courts, are applicable.<sup>22</sup>

§ 7. **The Bond.**—The judge or justice signing the citation is directed (except in cases taken up by the United States or by direction of any department thereof) to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ of error is to operate as a *supersedeas*. In the event no *supersedeas* is sought, the bond may be conditioned to answer all costs.<sup>23</sup>

I can find nothing in the reports to indicate any lack of conformity with the general rules upon this subject heretofore laid down.<sup>24</sup>

§ 8. **Supersedeas—Limitation of Time.**—Taking up the question of *supersedeas*, Section 1007 applies equally to writs of error to a state court; except that the last clause providing for an automatic stay of execution for ten days has no application.<sup>25</sup>

Exceptional cases are said to arise, where the state law requires the judgment or decree of the highest court to be returned to the lower court for execution; and in such cases it is said that the writ of error (under the old law) might operate as a *supersedeas* if granted and returned at any time within 60 days from the entry in the lower court of the return of the proceedings.<sup>26</sup> The judgment is said not to be considered as final, until entered in a court from which execution can issue.<sup>27</sup>

§ 9. **Issue of Writ—To Whom Directed.**—Assuming that the petition for a writ of error has been allowed by a state

<sup>22</sup> Cf. *O'Dowd v. Russell*, 14 Wall. 402; *Aldrich v. Aetna Ins. Co.*, 8 Wall. 491; *Tripp v. Santa Rosa, Etc., Ry. Co.*, 144 U. S. 126.

<sup>23</sup> R. S. 1000; Rule 29, Supreme Court.

<sup>24</sup> Cf. *Martin v. Hunter's Lessee*, 1 Wheat. 1. c. 361.

<sup>25</sup> *Doyle v. Wisconsin*, 94 U. S. 50; *Foster v. Kansas*, 112 U. S. 201.

<sup>26</sup> *Slaughter House Cases*, 10 Wall. 273.

<sup>27</sup> *Green v. Van Buskirk*, 3 Wall. 448. But Cf. *Crane Iron Co. v. Hoagland*, 105 U. S. 701.

judge or a justice of the Supreme Court, the writ may be issued by the clerk of the Supreme Court or by a clerk of the District Court within the proper district of the state to whose court it is directed.<sup>28</sup>

Where allowed by the state judge, it is customary to sue out the writ from the clerk of the District Court, after exhibiting to him the order or certificate of allowance. Its actual issue is an essential prerequisite to review.<sup>29</sup> To what court is it to be addressed?

The function of the writ of error is to bring up the record. It should, therefore, be addressed to the court where that record remains. In the language of Justice Story in an early case: "It appears to the Court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined here must be that of the highest court of the state having cognizance of the cause, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."<sup>30</sup>

The correct rule was laid down in *Atherton v. Fowler*.<sup>31</sup> It was there held that if, pursuant to the laws of the particular state, the highest state court, after its judgment, has sent down its record and judgment to the inferior court, and no longer has them in its possession, the writ might go either to the highest court or to the inferior court. Where the highest court is by law the custodian of its own records, that court *alone* is authorized to certify that record to the Supreme Court. If the highest court, even where it has not the record, can and will procure a copy thereof and transmit the same, with the requisite certificate, the writ may run to that court. If it be judicially known that, according to state practice,

<sup>28</sup> R. S. 1004; *Buel v. Van Ness*, 8 Wheat. 312; *Ex parte Ralston*, 119 U. S. 613.

<sup>29</sup> *Ex parte Ralston*, 119 U. S. 613.

<sup>30</sup> *Gelston v. Hoyt*, 3 Wheat. 1. c. 304; Cf. *McGuire v. Massachusetts*, 3 Wall. 382; *Aldrich v. Aetna Ins. Co.*, 8 Wall. 495.

<sup>31</sup> 91 U. S. 143.

the lower court has the record, or that the highest court will not or cannot certify the record which has gone down, the Supreme Court will send down its writ to the lower court in the first instance.<sup>32</sup>

§ 10. **The Record and Transcript.**—With respect to the preparation of the record and the filing of the transcript, the docketing of the case and subsequent proceedings, there is nothing which I can find in the reports which indicates that they are not governed in all respects by rules analogous to those heretofore laid down as applicable to writs of error addressed by the Supreme Court to an inferior federal court. Ever since the case of *Murdock v. Memphis*, it has been the law of the Supreme Court that the opinion of the state court formed a part of the record, where it was a matter of record below.<sup>33</sup>

§ 11. **Summary of Procedure to Obtain Writ of Error.**—The following steps may be imagined as involved in ordinary cases; not necessarily in the precise order:

1. Obtain from the State Court, upon terms if necessary, a temporary stay of the mandate or execution, upon the ground that you propose to carry the case to the Supreme Court of the United States.

2. Proceed to summon and sever necessary co-parties not joining and file the original notice, with the acknowledgment or return of service in the State Court. I think it is preferable also to have the record of the State Court show a finding of refusal or failure of such co-parties to join, after due notice, as well as an order allowing the severance.

3. File and present to the proper state judge a written petition praying allowance of the writ of error.

<sup>32</sup> *Rothschild v. Knight*, 184 U. S. l. c. 339; *McDonald v. Massachusetts*, 180 U. S. 311; *Polleys v. Black River Co.*, 113 U. S. 81; *Lee v. Johnson*, 116 U. S. 48.

<sup>33</sup> *Murdock v. Memphis*, 20 Wall. 590; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477; *Kreiger v. Shelby R. R. Co.*, 125 U. S. 39; *Carson v. Lumber Co.*, 142 Fed. 893; *U. S. v. Taylor*, 147 U. S. l. c. 700; *Loeb v. Township*, 179 U. S. l. c. 483.



§ 11 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

4. File with the petition for the writ of error an assignment of errors, drawn with particularity and precision (having in mind the rules on that subject) and conclude the said assignment with a prayer for reversal.

5. Have your bond ready, in a sum already indicated by the proper state judge, whether it be for costs or *supersedeas*, with justification of the sureties, or written acceptance of their sufficiency from the adverse side.

6. Obtain from the proper state judge a written order allowing the writ and a written order approving the bond.

7. Get the proper state judge to sign citation to the adverse parties.

8. Take your order of allowance to the clerk of the United States District Court for the district in which the State Court, whose judgment is to be reviewed, is located, and have him issue the original writ of error. Obtain also one copy of the writ for the clerk of the State Court for his files, and an additional copy for each of the adverse parties.

9. Have counsel of record for the adverse parties acknowledge service of citation or cause copies thereof to be served upon such adverse parties or their counsel of record. Observe the remarks of the Court in *Tripp v. Santa Rosa, etc., Ry. Co.*, in 144 U. S. 126. I do not think it is usual to have service made by the U. S. Marshal or some one especially appointed by the proper state judge, in accordance with the analogy of the Fifteenth Equity Rule. In this jurisdiction it seems to be customary to serve by a competent witness, who makes a sworn return. If trouble were anticipated, the course might be otherwise.

10. See that there has been filed with the clerk of the State Court the original petition for the writ of error, the order of allowance, the original assignment of errors and prayer for reversal, the original bond and the order approving it, the original citation with proof of service, the original writ of error and the copies heretofore specified.

11. In the meantime you will have directed the clerk of the State Court to proceed with the making up of his tran-

script. That transcript should set forth a copy of the record of the state court (or such portions thereof as have been designated by counsel) and a copy of the opinion or opinions of the state court, both properly certified; and should also contain the original petition for the writ of error; the original order of allowance; the original assignment of errors and prayer for reversal; the original writ of error; the original citation with the waiver or return of service; a *copy* of the bond and order approving it. It should also appear by appropriate certification that the documents mentioned were filed in the office of the clerk of the State Court, and the dates of filing given. This filing is frequently shown by certifying the indorsements or file marks.

There should be appropriate authentication of the transcript, and formal return as to the writ of error.

In the event there has been summons and severance, or equivalent proceedings, you should also include the original notice to join, and the return or waiver of service thereon, as well as any finding or order made in that regard.

12. See that the record is promptly transmitted by the clerk of the State Court to the clerk of the United States Supreme Court.

13. Send to the Clerk of the Supreme Court the sum of Twenty-five Dollars, with an entry of your appearance in the cause, and a request that the same be docketed.

If you are not a member of the Bar of the Supreme Court, get some friend to lend his name and qualification in that regard.

If it proves to be impracticable to transmit and file the transcript within the time limited, written application should be made (with the reasons therefor) to the proper state judge, and an order obtained from him extending the time. These proceedings are to be filed and embodied in the transcript.

§ 12. **Review by Certiorari.**—In order to obtain review by *certiorari* of a final decision of a state court, I understand that the procedure is as follows:

Prepare an original petition for the writ of *certiorari*,

§ 12 JURISDICTION AND PRACTICE OF FEDERAL COURTS.

signed in writing by counsel. This petition should show (*in summary fashion*) that there is a particular federal question, or questions, properly presented in the cause; that such federal question was raised and decided, expressly or by necessary effect; that it was such a character as to fall within the class of cases reviewable; that the decision of such question is *controlling*, as to the disposition of the cause; together with the general reasons for allowance of the writ. It should not run, when printed, over eight or nine pages, at most.

This petition is entitled in the name of the petitioner, as such, and against his adversary, as respondent.

This original petition, together with a certified copy of the transcript of the entire record in the state court (as an exhibit) must be filed in the office of the clerk of the Supreme Court, together with a written entry of appearance of counsel for petitioner, signed by a member of the bar of the Supreme Court. A deposit for costs is made at the same time, in the sum of twenty-five dollars.

Some Monday must be selected as the day of presentation and submission. Having selected such date, counsel for petitioner causes to be printed his petition, and his brief in support thereof, under one cover; which must be served on counsel for respondent at least two weeks before the date set for presentation and submission, together with a written notification of said date. This notice usually is printed after the brief, on a separate page, and under a distinct caption. Where counsel to be notified resides west of the Rocky Mountains, three weeks' notice must be given.

At least three days before the date set for presentation and submission, there must be filed in the office of the clerk of the Supreme Court proof of service upon the adverse side; at least thirty printed copies of the petition and brief in support thereof; and at least nine uncertified copies of the record, which must contain all the proceedings in the highest state court, which copies *may* be made up by using such portions of the record in the court below as were printed, and adding thereto printed copies of the proceedings in that court.

No oral argument is permitted, on such petitions, but they are called up and submitted in open court; or, if the court be in vacation, the necessary papers are simply filed in due time with the clerk.

If a respondent desire to oppose a petition, he must prepare and print his brief in opposition, serve it on counsel for petitioner, and file 30 printed copies, with proof of service, with the clerk of the Supreme Court, at least three days before the day fixed for presentation and submission.<sup>34</sup>

If issued, the effect of the writ of *certiorari* is to stay all proceedings, pending the decision of the Supreme Court.<sup>34a</sup>

As heretofore stated, the limitation of time within which the *application* must be made is three months from the entry of the judgment or decree. What is meant by "*applied for*," is difficult to say.<sup>35</sup>

<sup>34</sup> Supreme Court Rule 37, as amended. Printed instructions of the Clerk of the Supreme Court.

<sup>34a</sup> *Louisville, Etc., R. R. Co. v. Trust Co.*, 78 Fed. 659; *Waskey v. Hammer*, 179 Fed. 273.

<sup>35</sup> Act Sept. 6, 1916.



# TABLE OF CASES

(References are to pages.)

## A

- Abbotsford, The, 412, 454.  
 Abeel v. Culberson, 228.  
 Aberfoyle, The, 365.  
 Ableman v. Booth, 23, 223, 301.  
 Abraham v. Ins. Co., 88.  
 Acadia, The, 365.  
 Acker, In re, 306.  
 Acord v. Western, Etc., Co., 293, 294.  
 Active, The, 404, 402.  
 Adams v. Church, 507.  
 Adams v. New York, 336.  
 Adams v. Russell, 506.  
 Adams County v. Burlington R. Co., 506.  
 Adams Express Co. v. Croninger, 192.  
 Adamson v. Shaler, 271.  
 Adamson v. U. S., 338.  
 Adelbert College v. Toledo, Etc., R. Co., 154.  
 Advance, The, 383.  
 Aeolian Co. v. Standard, Etc., Co., 178.  
 Aetna Ins. Co. v. Brown, 455.  
 Aetna Life Ins. Co. v. Moore, 201.  
 Agnew v. U. S., 322, 321.  
 Akers v. Akers, 122.  
 Alabama, The, 365.  
 Alabama, Etc., R. R. Co. v. Thompson, 123, 133, 138.  
 Alaska, The, 361.  
 Alaska, etc., Mining Co. v. Keating, 464, 465.  
 Albany, Etc., Co. v. Lundberg, 173.  
 Albert Dumois, The, 361.  
 Alberto, The, 365.  
 Alder v. Edenborn, 182.  
 Aldrich v. Aetna Ins. Co., 480, 517, 518.  
 Alexander v. U. S., 338, 438.  
 Alexis v. U. S., 338.  
 Allen v. Argimbau, 506.  
 Allen v. Bank, 455.  
 Allen v. Hallet, 364.  
 Allen v. Newberry, 353.  
 Allen-West Co. v. Brashear, 78.  
 Alley v. Nott, 153.  
 Allis v. Ins. Co., 218.  
 Allis v. U. S., 186, 456, 340.  
 Altenberg v. Grant, 482.  
 Altman v. U. S., 424.  
 Alviso v. U. S., 480.  
 Ambler v. Eppinger, 56.  
 American Barge Co. v. Chesapeake, Etc., Co., 406.  
 American Book Co. v. Kansas, 506.  
 American, Etc., Co. v. Pettijohn, 265.  
 American Ins. Co. v. Cotton, 21.  
 American Lithograph Co. v. Werckmeister, 179.  
 American Pub. Co. v. Fisher, 183.  
 American Steamboat Co. v. Chase, 358.  
 American Steel Co. v. Wire-drawers' Union, 241.  
 American Sugar Co. v. Louisiana, 505.  
 American Sugar Co. v. New Orleans, 424.  
 American Sugar Co. v. U. S., 427.  
 American Surety Co. v. Lawrence, 88.  
 Ames v. Kansas, 81, 119.  
 Ames v. Smith, 445.  
 Amy v. Watertown, 42, 198, 173.  
 Anaconda, Etc., Co. v. Butte, Etc., Co., 111.  
 Anderson v. R. R. Co., 255.  
 Anderson v. United Realty Co. 140.

# TABLE OF CASES

(References are to pages.)

Anderson v. Watt, 79.  
 Anderson v. Western Union Co., 123.  
 Andrews v. Essex Ins. Co., 373.  
 Andrews v. Pipe Co., 475.  
 Andrews v. Thatcher, 368.  
 Andrews v. Thum, 470.  
 Andrews v. U. S., 339.  
 Andrews v. Wall, 405, 366.  
 Angel v. Smith, 252.  
 Anglo-American, Etc., Co. v. Davis, 420.  
 Anglo-American, Etc., Co. v. Lombard, 197.  
 Ann C. Pratt, The, 384, 383.  
 Annie H. Smith, The, 370.  
 Ansbro v. U. S., 427.  
 Anthony v. Louisville, Etc., R. R. Co., 186.  
 Apapas v. U. S., 432, 428, 427.  
 Appleby v. Buffalo, 504.  
 Archer v. Greenville Sand Co. 202.  
 Arkansas v. Kansas, Etc., Coal Co., 60, 81, 126.  
 Arkansas v. Schlierholz, 427.  
 Arkansas Etc., Co., v. Belden, 173.  
 Armstrong v. Ettlesohn, 110.  
 Armstrong v. Kansas City, Etc., R. R. Co., 129, 151.  
 Arndt, v Griggs, 24, 35.  
 Arthur v. Maryland, Casualty Co., 145.  
 Ask, The, 409.  
 Aspen Mining Co., v. Billings, 291, 450.  
 Atherton v. Fowler, 480, 518.  
 Atkins v. Fiber Co., 26, 392.  
 Atlantic Coast Line, v. Goldsboro, 508.  
 Atlantic, Etc., Co. v. Carter, 135.  
 Atlantic Transport Co. v. Imbrovek, 303, 358, 359, 361.  
 Atlantic Trust Co. v. Dana, 254.  
 Atlas, The, 387.  
 Atlas Co. v. Rheinstrom, 475.  
 Atlas Underwear Co. v. Cooper Co. 243.  
 Atlee v. N. W. Packet Co., 360, 365.  
 August Belmont, The, 403, 402, 401.

Austin v. Riley, 289.  
 Avery v. Vilas, 230.  
 Ayers, In re, 7, 6.  
 Ayers v. Carver, 444.  
 Ayers v. Polsdorfer, 424, 429.  
 Ayers v. Watson, 140, 189.  
 Ayres v. Wiswall, 130.

## B

Back v. Sierra, Etc., Co., 122.  
 Backrath, v. Norton, 64.  
 Bacon v. Hart, 480.  
 Bacon v. Reeves, 31, 126.  
 Bacon v. Robertson, 241.  
 Bacon v. Texas, 497.  
 Bagenas v. Southern Pac. Co., 123, 127.  
 Bagley v. Fire Extinguisher Co., 429.  
 Bags of Linseed, 352.  
 Baggs v. Martin, 140.  
 Bailey v. Mosher, 122.  
 Bain, ex parte, 315.  
 Baker v. Pinkham, 82.  
 Baker v. Portland, 241, 242.  
 Baldwin v. Chicago R. R. Co., 72.  
 Ball v. U. S., 344, 341, 325.  
 Ballard Paving Co. v. Mulford, 103.  
 Ballew v. U. S. 178, 342, 341, 338.  
 Balliet v. U. S., 345, 326.  
 Ballin v. Lehr., 82.  
 Ballman v. Fagin, 334.  
 Baltimore, The, 412, 411.  
 Baltimore, Etc., R. R. Co. v. Baugh, 202.  
 Baltimore, Etc., R. R. Co. v. Burns, 143.  
 Baltimore, Etc. R. R. Co. v. Grant 433.  
 Baltimore, Etc. R. R. Co. v. Harris, 69, 484, 509.  
 Baltimore, Etc., R. R. Co. v. Hopkins, 509.  
 Baltimore, Etc., R. R. Co. v. Joy, 147.  
 Baltimore, Etc., R. R. Co. v. Koontz, 67, 139, 145.  
 Baltimore, Etc., R. R. Co. v. McCune, 473.

## TABLE OF CASES

(References are to pages.)

- |   |   |
|---|---|
| Baltimore, Etc. R. R. Co. v. Mackey, 186.                         | Barton v. Barbour, 92.                          |
| Baltimore, Etc., R. R. Co. v. Thornton, 201.                      | Barton v. Forsythm, 446.                        |
| Baltimore, Etc., R. R. Co. v. Wabash Co., 226.                    | Basket v. Hassell, 468, 470.                    |
| Banigan v. Worcester, 121.  | Bauman v. Hart, 34.                             |
| Bank v. Daniel, 54.   | Bauserman v. Blunt, 194.                        |
| Bank v. Dudley, 194.  | Bausman v. Dixon, 64.                           |
| Bank v. Liewer, 197.  | Baxter v. Phillips, 486.                        |
| Bank v. Patteson, 456.  | Bayard v. Lombard, 470.                         |
| Bank v. Planters Bank, 8, 5.                                      | Bayliss v. Lafayette Co., 256.                  |
| Bank v. Sheffey, 445, 442.  | Bayonne, The, 422.                              |
| Bank v. Turnbull, 116.  | Beaconsfield, The, 378, 408.                    |
| Bank v. Wister, 8.  | Beals v. Hale, 197.                             |
| Bankers' Mutual, Etc., Co. v. Minneapolis, Etc., Co., 59, 60, 64. | Beardsley v. Arkansas, Etc., Ry. Co., 468, 476. |
| Bankers' Trust Co. v. Tex. Pac. Ry. Co., 63.                      | Beauregard v. New Orleans, 203.                 |
| Bannon v. U. S., 338.   | Beasley v. Texas, Etc., R. R. Co., 435.         |
| Baracoa, The, 381.  | Beatty v. Kurtz, 241.                           |
| Barber Asphalt Co. v. Morris, 120, 121, 226.                      | Beaupre v. Noyes, 450.                          |
| Barber v. Barber, 207.  | Beaver v. Taylor, 186.                          |
| Barber v. Pittsburg, Etc., Co. 202.                               | Beavers v. Henkel, 310, 309.                    |
| Bardes v. First Nat'l Bank, 419.                                  | Beckwith v. Range Co., 285.                     |
| Bark Havre, The, 387.   | Bee, The, 403.                                  |
| Barlow v. Chi., Etc., Ry. Co., 127.                               | Bedford v. Burton, 216.                         |
| Barnard v. Adams, 368.  | Beers v. Haughton, 164.                         |
| Barnard v. Gibson, 447.   | Behn v. Campbell, 454.                          |
| Barney v. Baltimore, 31, 66, 75, 244.                             | Belfast, The, 15, 352, 365, 358, 357.           |
| Barney v. Keokuk, 202.  | Belmont Co. v. Columbia Co. 255.                |
| Barney v. Latham, 130, 135, 133.                                  | Belt, Ex parte, 327.                            |
| Barnstable, The, 201, 408.  | Bement v. Harrow Co., 507.                      |
| Barr v. Gratz, 445.   | Bencliff, The, 409.                             |
| Barrell v. Propeller Mohawk, 465.                                 | Bender v. Pennsylvania Co., 445.                |
| Barrett v. U. S., 38.   | Bendey v. Townshead, 218.                       |
| Barrels of Fertilizer, 369.                                       | Benefactor, The, 412.                           |
| Barrington v. Missouri, 502.                                      | Benjamin v. Bois, 435.                          |
| Barrow v. Hunton, 89, 97, 115.                                    | Benner v. Porter, 21.                           |
| Barrow Steamship Co. v. Kane, 26, 42.                             | Bennett v. DeVine, 123.                         |
| Barry v. Edmunds, 62, 108.  | Bennett v. Hoefner, 289.                        |
| Barry v. Mercein, 108.  | Benson v. U. S., 337.                           |
| Bartemeyer v. Iowa, 513, 516.                                     | Bergemann v. Backer, 497.                       |
| Bartlett v. Gates, 153.   | Berkowitz, In re, 297.                          |
| Bartlett v. The Sultan, 88.                                       | Berry v. St. Louis, Etc., R. Co., 123, 129.     |
|   | Berryman v. Whitman College, 107.               |
|   | Berwind v. R. R. Co., 263.                      |
|   | Beshears, In re, 309.                           |
|   | Bessette v. Conkey Co., 438, 431.               |
|   | Beutler v. Grand Trunk R. R. Co., 202.          |



## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| <p> <b>Beyer v. Le Fevre, 223.</b><br/> <b>Bien v. Robinson, 427, 418.</b><br/> <b>Bierce v. Waterhouse, 450.</b><br/> <b>Big Gap, Etc., Co. v. American, Etc., Co., 258.</b><br/> <b>Bigelow v. Calumet Co., 263.</b><br/> <b>Bitterman v. L. &amp; N. R. R. Co., 107.</b><br/> <b>Black v. The Louisiana, 364.</b><br/> <b>Blackburn v. Blackburn, 129.</b><br/> <b>Blacklock v. Small, 56.</b><br/> <b>Blackwell v. Tug Co., 378.</b><br/> <b>Blast Furnace Co. v. Worth, 278.</b><br/> <b>Bliss, The A. M., 364.</b><br/> <b>Bliss v. Anaconda, Etc., Co., 286, 287.</b><br/> <b>Blitz v. U. S., 343.</b><br/> <b>Block v. Darling, 186.</b><br/> <b>Bloomington v. Watson, 482.</b><br/> <b>Blossom v. Milwaukee, Etc., R. R. Co., 471.</b><br/> <b>Blythe v. Hinckley, 293, 505.</b><br/> <b>Board v. Wilder, 198.</b><br/> <b>Board of Trade v. Cella, 107.</b><br/> <b>Board of Trade v. Hammond, 417.</b><br/> <b>Boatmen's Bank v. Fritzlen, 128, 133, 226, 228.</b><br/> <b>Boatmen's Bank v. Trower, 170, 182, 189.</b><br/> <b>Bock v. Perkins, 64.</b><br/> <b>Bogart v. Southern Pac. Co. 418, 417.</b><br/> <b>Bogart v. The John Jay, 373.</b><br/> <b>Bogk v. Gassert, 475.</b><br/> <b>Bolden v. Jensen, 392.</b><br/> <b>Bolles v. Brimfield, 198.</b><br/> <b>Bolln v. Nebraska, 500.</b><br/> <b>Bond v. Dustin, 173, 182, 455.</b><br/> <b>Bondurant v. Watson, 115.</b><br/> <b>Bonner, In re, 344.</b><br/> <b>Bonner v. Meikle, 152.</b><br/> <b>Bonnie Doon, The, 369.</b><br/> <b>Boogher v. New York Life Ass'n. 182.</b><br/> <b>Bors v. Preston, 19.</b><br/> <b>Borden v. Heirn, 381.</b><br/> <b>Boston, The, 386.</b><br/> <b>Boston, Etc., Copper Co. v. Montana Ore Co., 60.</b><br/> <b>Boston, Etc., R. R. Co. v. Gokey, 174.</b> </p> | <p> <b>Bostwick v. Brinkerhoff, 449, 435.</b><br/> <b>Boutin v. Rudd, 365.</b><br/> <b>Bowditch v. Boston, 184.</b><br/> <b>Bowe v. Scott, 502, 504.</b><br/> <b>Bowen v. Christian, 88.</b><br/> <b>Bowker v. United States, 407, 444, 419.</b><br/> <b>Bowles v. Heinz, 129.</b><br/> <b>Bowling Green, Etc., Co. v. Virginia, Etc., Co., 258.</b><br/> <b>Bowman v. Chi., Etc., R. R. Co., 109.</b><br/> <b>Boyce v. Grundy, 222.</b><br/> <b>Boyce v. Tabb, 200, 202.</b><br/> <b>Boyd v. R. R. Co., 260, 267, 268.</b><br/> <b>Boyd v. U. S., 334, 336.</b><br/> <b>Boyd v. Urqhart, 393.</b><br/> <b>Boyer, Ex parte, 358.</b><br/> <b>Boyle v. Zacharie, 207, 445.</b><br/> <b>Bracken v. Union Pacific Ry., 34.</b><br/> <b>Bradford v. Bradford, 390.</b><br/> <b>Bradford v. Southern Ry. Co., 466.</b><br/> <b>Bradstreet, Ex parte, 460.</b><br/> <b>Braithwalte v. Jordan, 413.</b><br/> <b>Bram v. U. S., 338.</b><br/> <b>Brandies v. Cochrane, 465.</b><br/> <b>Braxton County Court, v. West Virginia, 506.</b><br/> <b>Breedlove v. Nicolet, 82.</b><br/> <b>Breese v. U. S., 322, 344.</b><br/> <b>Bremena, The v. Card, 392.</b><br/> <b>Brewster v. Evans, 459.</b><br/> <b>Brewster v. Wakefield, 468.</b><br/> <b>Brevoor v. Fair American, 367.</b><br/> <b>Bridge Proprietors, v. Hoboken Co., 508.</b><br/> <b>Brig Aurora, 388.</b><br/> <b>Briggs v. Taylor, 400.</b><br/> <b>Brine v. Hartford, 211.</b><br/> <b>Briscoe v. Rudolph, 474.</b><br/> <b>Britton v. Venture, 373.</b><br/> <b>Brockett v. Brockett, 445.</b><br/> <b>Broderick's will, In re, 213.</b><br/> <b>Brolan v. U. S., 432.</b><br/> <b>Bronson v. R. R. Co., 256, 258.</b><br/> <b>Bronson v. Schulten, 289, 292.</b><br/> <b>Brooklyn, Etc., R. R. Co. v. Bank, 195, 201.</b><br/> <b>Brooks v. Clark, 133, 135.</b><br/> <b>Brooks v. Norris, 484, 485.</b> </p> |
|--|--|

# TABLE OF CASES

(References are to pages.)

Brower, The A. G., 413.  
 Brown v. Allerbach, 85.  
 Brown v. Atwell, 506.  
 Brown v. Bank, 495.  
 Brown v. Baxter, 450.  
 Brown v. Clarke, 445.  
 Brown v. Fletcher, 55, 57.  
 Brown v. McConnell, 465, 476, 481.  
 Brown v. N. W. Life Ins. Co., 478.  
 Brown v. Strode, 74, 249.  
 Brown v. Walker, 335, 334.  
 Browne v. U. S., 343.  
 Bruce v. U. S., 316.  
 Bucher v. Cheshire R. R. Co., 194, 198.  
 Buck v. Colbuth, 84, 510.  
 Buck v. Felder, 135.  
 Buckingham v. McLean, 480.  
 Bucklin v. U. S., 345, 342.  
 Buckner v. Finley, 54.  
 Bucyrus Co. v. McArthur, 260, 274.  
 Budzisz v. Illinois Steel Co., 427.  
 Buel v. Farmers' Loan, Etc., Co., 470.  
 Buel v. Van Ness, 518.  
 Buffalo Specialty Co. v. Van Cleef, 270, 271, 272.  
 Bulkeley v. Cotton Co., 357.  
 Bunce v. Gallagher, 242.  
 Bunel v. O'Day, 272.  
 Burchett v. U. S., 321.  
 Burgess v. Seligman, 197, 198, 199, 200.  
 Burlington, Etc., Co. v. Dunn, 138.  
 Burma, The, 409.  
 Burton v. U. S., 339, 432, 314.  
 Burton v. West Jersey, Etc., Co., 186.  
 Bushnell v. Kennedy, 54, 56.  
 Butler, v. Gage, 513, 514, 515.  
 Butler v. Steamship Co., 354, 355, 372.  
 Byers v. McAuley, 83, 117.  
 Byrne v. Jones, 290.  
 Byrne v. Rockaway, 377.

## C

Cable v. Ellis, 130.  
 Caha v. U. S., 316.  
 Calhoun v. Ajax, Etc., Co., 192.  
 California, The, 403, 401.  
 California v. San Pablo, Etc., R. R. Co., 505.  
 California v. Southern Pacific Co., 81, 244.  
 California Bank v. Statler, 449, 495.  
 California Ins. Co. v. Compress Co., 185.  
 Callan v. May, 516.  
 Callan v. Wilson, 327.  
 Camanche, The, 378.  
 Cambria Iron Co. v. Ashburn, 151.  
 Cambuston v. U. S., 188.  
 Camden Iron Works v. Slater, 463.  
 Camden R. R. Co. v. Stetson, 177.  
 Cameron v. M'Roberts, 31.  
 Camp v. Parker, 293, 294.  
 Campbell v. Boyreau, 180.  
 Campbell v. Golden Cycle Co., 420.  
 Campbell v. Hackfield, 361.  
 Campbell v. Haverhill, 194.  
 Campbell v. Milliken, 151.  
 Campbell v. Uncle Sam, 387.  
 Cape Fear Co. v. Pearsall, 399.  
 Capital City Dairy Co. v. Ohio, 505.  
 Capital Nat'l Bank v. Bank, 503.  
 Capital Traction Co. v. Hof, 183, 454.  
 Card v. Hines, 379, 388.  
 Cardona v. Quinones, 486.  
 Carey v. Houston, Etc., Ry. Co., 88, 91, 424, 419, 427.  
 Carico v. Wilmore, 306.  
 Carne v. Russ, 107.  
 Carolina, The, 392.  
 Carolina Glass Co. v. South Carolina, 424.  
 Carondelet, Etc., Co. v. La., 439, 494.  
 Carpenter v. Ins. Co., 201.  
 Carpenter v. Strange, 24, 25.  
 Carpenter v. Winn, 178.

## TABLE OF CASES

(References are to pages.)

- |   |  |
|---|--|
| <p> <b>Carr v. Fife</b>, 108.<br/> <b>Carrick v. Landmann</b>, 122.<br/> <b>Carroll v. Carroll</b>, 197.<br/> <b>Carson v. Dunham</b>, 145.<br/> <b>Carson v. Holtzclaw</b>, 116.<br/> <b>Carson v. Lumber Co.</b>, 519.<br/> <b>Carter v. Texas</b>, 321, 323.<br/> <b>Carver v. U. S.</b>, 329.<br/> <b>Cary v. Curtis</b>, 20.<br/> <b>Case of Sewing Machine Cos.</b>, 151.<br/> <b>Casey v. Adams</b>, 32.<br/> <b>Casey v. Leary</b>, 392.<br/> <b>Castillo v. McConnico</b>, 505.<br/> <b>Cates v. Allen</b>, 147, 214.<br/> <b>Cathey v. Norfolk, Etc., R. R. Co.</b>, 295.<br/> <b>Cayuga, The</b>, 410.<br/> <b>Cedar Rapids Gas Co. v. Cedar Rapids</b>, 507.<br/> <b>Cella v. Brown</b>, 126, 129.<br/> <b>Celluloid Co. v. Cellonite Co.</b>, 287.<br/> <b>Cely v. Griffin</b>, 33.<br/> <b>Central, Etc., Co. v. Bridges</b>, 85.<br/> <b>Central, Etc., Co. v. Cambria Steel Co.</b>, 474.<br/> <b>Central Nat. Bank v. Stevens</b>, 87.<br/> <b>Central R. R. Co. v. White</b>, 507.<br/> <b>Central Transp. Co. v. Pullman</b>, 173.<br/> <b>Central Trust Co. v. Continental Trust Co.</b>, 474, 475.<br/> <b>Central Trust Co. v. Grant</b>, 437.<br/> <b>Central Trust Co. v. Lueders</b>, 430.<br/> <b>Central Trust Co. v. McGeorge</b>, 265.<br/> <b>Central Trust Co. v. Sheffield</b>, 236.<br/> <b>Central Trust Co. v. St. Louis, Etc., R. R. Co.</b>, 72.<br/> <b>Central Trust Co. v. Western, Etc., R. Co.</b>, 229.<br/> <b>Central Vermont Co. v. Redmond</b>, 226.<br/> <b>Chadbourne v. Coe</b>, 245, 247.<br/> <b>Chadwick v. U. S.</b>, 319, 343.<br/> <b>Chae Chan Ping v. U. S.</b>, 3.<br/> <b>Chamberlain, Ex parte</b>, 227.<br/> <b>Chamberlain v. Peoria, Etc., R. R. Co.</b>, 293.         </p> | <p> <b>Chamberlin Transp. Co. v. South Pier Co.</b>, 465.<br/> <b>Chambers v. Baltimore, Etc., R. R. Co.</b>, 502.<br/> <b>Chandler v. Dix</b>, 7.<br/> <b>Chapman v. Barney</b>, 73, 275.<br/> <b>Chappedelaine v. Dechenaux</b>, 57.<br/> <b>Chappell v. U. S.</b>, 170, 423.<br/> <b>Chappell v. Waterworth</b>, 124.<br/> <b>Chase v. Beech Creek Co.</b>, 130.<br/> <b>Chase v. Wetzlar</b>, 36.<br/> <b>Chateaugay Iron Co. Ex parte</b>, 172, 459, 460.<br/> <b>Cherokee Nation v. Georgia</b>, 2, 3.<br/> <b>Chesapeake, Etc., Canal Co. v. Bank</b>, 445.<br/> <b>Chesapeake, Etc., R. R. Co. v. Cockrell</b>, 134.<br/> <b>Chesapeake, Etc., R. R. Co. v. Dixon</b>, 132, 133.<br/> <b>Chesapeake, Etc., R. R. Co. v. McCabe</b>, 139, 449, 495.<br/> <b>Chesapeake, Etc., R. R. Co. v. McDonald</b>, 139.<br/> <b>Chesapeake &amp; Potomac Tel. Co. v. Manning</b>, 449.<br/> <b>Chester v. Life Ass'n</b>, 255, 256.<br/> <b>Chetwood, Ex parte</b>, 85, 466.<br/> <b>Chicago, In re</b>, 136.<br/> <b>Chicago v. Hutchinson</b>, 136.<br/> <b>Chicago v. Mills</b>, 422.<br/> <b>Chicago Board, Etc., v. Hammond</b>, 44, 174.<br/> <b>Chicago, Etc., R. R. Co. v. Blair</b>, 481.<br/> <b>Chicago, Etc., R. R. Co. v. Dowell</b>, 133, 134, 135.<br/> <b>Chicago, Etc., Ry. Co. v. Fossdick</b>, 442.<br/> <b>Chicago, Etc., R. R. Co. v. Kendall</b>, 175, 177.<br/> <b>Chicago, Etc., R. R. Co. v. Martin</b>, 129.<br/> <b>Chicago, Etc., Ry. Co. v. Osborne</b>, 450.<br/> <b>Chicago, Etc., Ry. Co. v. Roberts</b>, 445.<br/> <b>Chicago, Etc., R. R. Co. v. Schwyhart</b>, 135.<br/> <b>Chicago, Etc., R. R. Co. v. Solan</b>, 201.         </p> |
|---|--|

## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| Chicago, Etc., R. R. Co. v. Whiteaker, 133, 134, 135.    | Clay Center v. Farmers' Trust Co., 109.                          |
| Chicago, Etc. R. R. Co. v. Whittton, 72, 111.            | Clement v. U. S., 323, 325.                                      |
| Chicago, Etc. R. R. Co. v. Willard, 133, 135, 140.       | Cleveland v. C. C., Etc., R. Co., 151.                           |
| Chicago Ins. Co. v. Graham, Etc., Co., 413.              | Cleveland, Etc., Ry. Co. v. Cleveland, 504.                      |
| Chicago Vault Co. v. McNulta, 254.                       | Cleveland, Etc., R. R. Co. v. Steamship Co., 359, 411.           |
| Chief, The, 383.   | Clifton, The, 373.   |
| Chiesa, The, v. Conover, 392.                            | Clinton v. Engelbrecht, 21.                                      |
| Childress v. Emory, 57.                                  | Clipper Mining Co. v. Eli Mining Co., 507.                       |
| Ching v. U. S., 340.                                     | Cloquet Lumber Co. v. Barnes, 445.                               |
| Chisholm v. Georgia, 9.                                  | Clough v. Curtis, 510, 3.  |
| Chouteau v. Gibson, 506.                                 | Clune v. U. S., 455, 345.  |
| Chrisman v. Miller, 507.                                 | Clyatt v. U. S., 339, 457.                                       |
| Christensen, In re, 438.                                 | Coal Co. v. Blatchford, 74, 78, 249, 265.                        |
| Cincinnati, Etc., Co. v. Grand Rapids, Etc., Co., 485.   | Coal Co. v. Howes, 485.  |
| Cincinnati, Etc., Ry. Co. v. Bohon, 133.                 | Cobb v. Howard, 377.   |
| Cincinnati, Etc., Ry. Co. v. Snell, 450.                 | Cochran v. Montgomery County, 120, 129, 150, 151, 153, 154, 155. |
| Cincinnati, Etc., R. R. Co. v. Thiebaud, 427.            | Cochran v. U. S., 314, 325.                                      |
| Citizens Bank v. Cannon, 105.                            | Cockroft, Ex parte, 470.   |
| Citizens Savings, Etc., Co. v. Ill. Cent. R. R. Co., 36. | Codlin v. Kohlhausen, 505.                                       |
| City of Carlisle, The, 381.                              | Coe v. Armour Co., 495.  |
| City of Cleveland, v. Chisholm, 413.                     | Coffee v. Planters Bank, 56.                                     |
| City of Naples, The, 413.                                | Coffey v. U. S., 408.  |
| City of New York, The, 412.                              | Coffin, v. Jenkins, 388.   |
| City of Norwalk, The, 354, 356.                          | Cohan v. Rolling Wave, 377.                                      |
| City of Norwich, The, 372.                               | Cohens v. Virginia, 12, 19, 496, 9, 5, 115, 60, 58.              |
| City of Salem, 405.                                      | Cole v. Cunningham, 224.   |
| City of Toledo, The, 410.                                | Coleman v. Martin, 255.  |
| Claasen, in re, 311, 346, 347, 466, 483.                 | Collins v. Bradley, 274.   |
| Claasen v. U. S., 342, 345, 341.                         | Collins v. U. S., 345.   |
| Clara McIntyre, The, 383.                                | Colombia, The, 368.  |
| Clarion, The, 365.                                       | Columbia Heights, Etc., Co. v. Rudolph, 473.                     |
| Clarissa Ann, The, 369.                                  | Columbia Water Power Co., v. Electric Co., 499, 500.             |
| Clark v. Barnard, 5.                                     | Columbus Construction Co. v. Crane Co., 419, 456.                |
| Clark v. Bever, 121.                                     | Columbus, Etc., Ry. Co. Appeals, 288.                            |
| Clark v. Kansas City, 495.                               | Colvin, v. Jacksonville, 422, 421.                               |
| Clark v. U. S., 318.                                     | Commerce, The, 358.  |
| Clark v. Wells, 147.                                     | Commercial Bank v. Slocomb, 67.                                  |
| Clarke v. Deere, Etc., Co., 475.                         |  |
| Clarke v. Mathewson, 79, 91.                             |  |
| Clarkson v. Manson, 122.                                 |  |
| Clay v. Field, 100.                                      |  |

## TABLE OF CASES

(References are to pages.)

- |  |   |
|--|---|
| Commercial Ins. Co. v. Davis, 417.                       | Counselman v. Hitchcock, 334.                   |
| Commercial Transportation Co. v. Fitzhugh, 378.          | Covell v. Heyman, 84.                           |
| Commissioners v. Gorman, 477, 478.                       | Covington v. Bank, 436.                         |
| Compton v. Jesup, 83.                                    | Cowell v. City Water Supply Co., 106.           |
| Conard v. Ins. Co., 366, 456.                            | Cowles v. Mercer County, 66.                    |
| Conboy v. Bank, 451.                                     | Cowley v. Northern Pac. R. R. Co., 147, 213.    |
| Confiscation Cases, 371.                                 | Coyne v. Caples, 370.                           |
| Conley v. Mathieson Co., 45.                             | Craig v. Continental, Etc., Co., 372.           |
| Connecticut Mutual Co. v. Cushman, 218.                  | Craig v. Missouri, 1.                           |
| Connecticut Mutual Co., v. Spratley, 43.                 | Craighead v. Wilson, 436.                       |
| Conn. Mutual, Etc., Co. v. Union Trust Co., 174.         | Crain v. U. S., 317, 324.                       |
| Connell v. Smiley, 135, 141.                             | Cramer v. Wilson, 510.                          |
| Connell v. Utica, 133.                                   | Crane, Ex parte, 455.                           |
| Connemara, The, 98.                                      | Crane Iron Co. v. Hoagland, 517.                |
| Connolly v. Taylor, 79, 81.                              | Crapo v. Kelly, 503.                            |
| Connor v. Peugh, 470.                                    | Craven v. Clark, 182.                           |
| Connors v. U. S., 322.                                   | Crawford v. Neal, 75.                           |
| Connors v. Vicksburg, Etc., Co., 265.                    | Crawford v. The William Penn, 402.              |
| Conqueror, The, 368, 382.                                | Crawford v. Washington, Etc., Co., 261.         |
| Consolidated Turnpike Co. v. Norfolk Co., 505, 504, 502. | Credit Co. v. Ark. Central R. R. Co., 485, 486. |
| Consolidated Water Co. v. Babcock, 78.                   | Credits Commutation Co. v. U. S., 257.          |
| Continental Trust Co. v. Toledo, Etc., Ry. Co., 83, 463. | Crehmore v. Ohio, Etc., R. R. Co., 138, 145.    |
| Conway v. Taylor, 202.                                   | Creighton v. Kerr, 23.                          |
| Conwell v. Water Co., 88.                                | Crempton v. U. S., 325.                         |
| Cook v. Lillo, 79.                                       | Creswell v. Grand Lodge, 507.                   |
| Cook v. Smith, 413.                                      | Crim v. Rice, 273.                              |
| Cooper, In re, 3.  | Crosby v. Emerson, 475.                         |
| Cooper v. Newton, 85.                                    | Cross v. North Carolina, 305.                   |
| Cope v. Dry Dock Co., 359.                               | Crossley v. California, 305.                    |
| Corbin v. Black Hawk County, 55, 56.                     | Crowe v. Tuckey, 457.                           |
| Corbus v. Alaska Co., 263.                               | Crowley v. U. S., 321.                          |
| Corcoran v. Kostrometloff, 476.                          | Cubbins v. Commission, 274.                     |
| Corkran Oil Co. v. Arnaydet, 502, 514.                   | Cumberland, The, 368.                           |
| Cornell v. Green, 427.                                   | Cummings v. Merchants Bank, 209.                |
| Cornell University v. Fiske, 507.                        | Cunningham v. Macon, Etc., Co., 8.              |
| Corzoal, The, 409.                                       | Cunningham v. Neagle, 306.                      |
| Corsair, The, 361, 382, 381.                             | Curley v. U. S.                                 |
| Corsicana Bank v. Johnson, 274.                          | Cushman v. Grammes, 286.                        |
| Cory v. Penco, 413.                                      | Cushing v. Laird, 392.                          |
| Coughran v. Bigelow, 173.                                | Cutler v. Huston, 20.                           |
| Coulston v. Steel Range Co., 269, 273.                   | Cutler v. Rae, 352, 368.                        |
|  | Cutting, Ex parte, 256, 470.                    |
|  | Cutting v. Gilbert, 241.                        |

# TABLE OF CASES

(References are to pages.)

## D

- Dailey v. New York, 408.  
 Dainese v. Kendall, 435.  
 Dalton v. Gunnison, 461.  
 Dana, In re, 308.  
 Dana v. Morgan, 263.  
 Daniel Ball, The, 358.  
 Danielson v. Northwestern Fuel Co., 477.  
 Danville v. Brown, 477.  
 D'Arcy v. Ketchum, 23.  
 Darnell v. Ill. Cent. Ry. Co., 418.  
 Davenport v. Dodge County, 89.  
 Davidson v. Green, 406.  
 Davidson v. Lanier, 464, 465, 476.  
 Davidson v. U. S., 475.  
 Davidson, Etc., Co. v. Gibson, 265.  
 Davidson Marble Co. v. U. S., 418.  
 Davis v. Adams, 409.  
 Davis v. Anglo-American, Etc., Co., 426.  
 Davis v. Cleveland, Etc., R. R. Co., 418, 420.  
 Davis v. Garrett, 289.  
 Davis v. Gray, 91.  
 Davis v. Los Angeles, 425, 426.  
 Davis v. Patrick, 461.  
 Davis v. Power, 283.  
 Davis v. Schwartz, 105, 284.  
 Davis v. South Carolina, 158.  
 Davis v. Wakelee, 23.  
 Dawn, The, 381.  
 Dawson v. Columbia, Etc., Co., 78, 128.  
 Day v. Mountain, Etc., Mill Co. 278.  
 Dealy v. U. S., 342.  
 Dean v. Mason, 288.  
 Dean v. Nelson, 439.  
 De Bearn v. Safe Deposit Co., 427.  
 Decker v. Smith, 286.  
 Deepwater R. R. Co. v. Western, Etc., Co., 136.  
 Defiance Water Co. v. Defiance, 62.  
 De Lima v. Bidwell, 148.  
 De la Rama v. De la Rama, 108.  
 Delaware County v. Diebold Safe Co., 117, 173.  
 Delaware, Etc., Co. v. Carboni, 182.  
 Delaware & Hudson Co. v. Alabama, 263.  
 Delaware Mutual Ins. Co. v. Gossler, 366.  
 De Lemos v. U. S., 345.  
 Dellemagne v. Moisan, 307.  
 Delmar Jockey Club v. Missouri, 505.  
 Delmas v. Ins. Co., 202.  
 De Lovio v. Bolt, 352, 364.  
 Deming v. Carlisle Packing Co. 505.  
 De Neufville v. Ry. Co., 263.  
 Dennis v. Slyfield, 388, 404.  
 Denver v. New York Trust Co., 452, 451.  
 Deputron v. Young, 62.  
 De Saussure v. Gaillard, 506.  
 Deschler v. Dodge, 55.  
 Deslions v. Compagnie Generale, 361, 448.  
 Des Moines, Etc., Co. Ex parte, 35.  
 Detroit v. Detroit City Ry. Co., 154.  
 Detroit v. Guaranty Trust Co., 470.  
 Detroit v. Osborne, 202.  
 Detroit City Co. v. Guthard, 506.  
 De Vaughn v. Hutchinson, 203, 218.  
 Devine v. Los Angeles, 60.  
 Dewey v. West Fairmount, 90.  
 Dexter Horton Bank v. Hawkins, 437.  
 Diaz v U. S., 337, 344.  
 Dibble v. Bellingham, Etc., Co., 506.  
 Dick v. Foraker, 35.  
 Dickerman v. Trust Co., 75, 258.  
 Dickins v. Beal, 54.  
 Dictator, The, 401, 405.  
 Diday v. New York, Etc., R. R. Co., 129.  
 Dietsch v. Huidekopper, 229.  
 Dietz v. Lymer, 462.  
 Dike v. St. Joseph, 368.  
 Dill v. Ebey, 504.  
 Director, The, 381.  
 Disney v. Furness, 379.  
 District v. McBlair, 450.

## TABLE OF CASES

(References are to pages.)

- |   |   |
|---|---|
| <p> <b>Doctor v. Harrington, 73.</b><br/> <b>Dodge v. Knowles, 476, 480, 481.</b><br/> <b>Dodge v. Norlin, 463.</b><br/> <b>Dodge v. Tulleys, 75, 218.</b><br/> <b>Dodge v. Woolsey, 73.</b><br/> <b>Dolan v. U. S., 319, 341.</b><br/> <b>Donald v. Philadelphia, Etc., Coal Co., 162.</b><br/> <b>Donovan v. Salem, Etc., Co., 390.</b><br/> <b>Dooley v. Pease, 200.</b><br/> <b>Dormitz v. Bridge Co., 35.</b><br/> <b>Dorr v. Ins. Co., 371.</b><br/> <b>Dorr v. United States, 183.</b><br/> <b>Douglas v. Commonwealth of Kentucky, 508.</b><br/> <b>Douglass v. Pike County, 198.</b><br/> <b>Dove, The, 407.</b><br/> <b>Dowagaic, Etc., Co. v. McSherry, 293.</b><br/> <b>Dowdell v. United States, 183.</b><br/> <b>Dewell v. Applegate, 20.</b><br/> <b>Dower v. Richards, 454, 507.</b><br/> <b>Downes v. Bidwell, 1.</b><br/> <b>Downham v. Alexandria, 496.</b><br/> <b>Downing v. McCarthy, 467.</b><br/> <b>Doyle v. Insurance Co. 437.</b><br/> <b>Doyle v. Wisconsin, 477, 517.</b><br/> <b>Drake v. Goodridge, 255.</b><br/> <b>Draher v. Davis, 465.</b><br/> <b>Drovers, Etc., Bank v. Tichenor, 125.</b><br/> <b>Duff v. U. S., 339.</b><br/> <b>Dugger v. Tayloe, 515.</b><br/> <b>Dull v. Blackman, 24.</b><br/> <b>Duluth Bridge Co. v. Steamer Troy, 359.</b><br/> <b>Dunbar v. U. S., 323, 344, 316.</b><br/> <b>Dunbar v. Weston, 365.</b><br/> <b>Dunlop v. U. S., 315.</b><br/> <b>Dunn, Re, 25, 63.</b><br/> <b>Dupont v. Vance, 368.</b><br/> <b>Dupree v. Mansur, 216.</b><br/> <b>Durland v. U. S., 323.</b><br/> <b>Durosseau v. U. S., 19.</b><br/> <b>Dwyer v. U. S., 343.</b> </p> | <p> <b>East Tenn., Etc., Co. v. Atlantic Co., 38.</b><br/> <b>East Tenn., Etc., Co. v. Grayson, 131.</b><br/> <b>East Tenn., Etc., Co. v. Southern Tel. Co., 148.</b><br/> <b>Eastern B. &amp; L. Ass'n v. Wellington, 500.</b><br/> <b>Eastfield, Etc., Co. v. McKeon, 377, 380, 377.</b><br/> <b>Easton, Ex parte, 366, 361, 358, 352.</b><br/> <b>Eclipse, The, 373, 358.</b><br/> <b>Eddy v. Casas, 127.</b><br/> <b>Edington v. U. S., 341.</b><br/> <b>Edmonson v. Bloomshire, 476.</b><br/> <b>Edwards v. Elliott, 362.</b><br/> <b>Edwards v. U. S., 490.</b><br/> <b>Edwin Baxter, The, 388, 408.</b><br/> <b>Egan v. Hart, 507.</b><br/> <b>Egan v. Spruce Lath, 369.</b><br/> <b>Elder v. McClaskey, 216, 449.</b><br/> <b>Eldorado Mining Co. v. Marioth, 455.</b><br/> <b>Eldred v. Palace Car Co., 265.</b><br/> <b>Electric Boat Co. v. Lake, Etc., Co., 243, 270, 271, 272.</b><br/> <b>Electric Vehicle Co. v. Craig, 269.</b><br/> <b>Electro-Dynamic Co. v. The Electron, 362.</b><br/> <b>Electron, The, 407.</b><br/> <b>Elgin v. Marshall, 107.</b><br/> <b>Eliza Lines, The, 382, 407.</b><br/> <b>Elizabeth Frith, The, 402.</b><br/> <b>Ellis v. Davis, 117.</b><br/> <b>Ellenwood v. Marietta Chair Co., 32, 24.</b><br/> <b>Ellison v. L. &amp; N. R. R. Co., 152.</b><br/> <b>Elmerdorf v. Taylor, 192.</b><br/> <b>Elton, The, 410.</b><br/> <b>Emblem, The, 367.</b><br/> <b>Emery Co. v. Tweedle Co., 406.</b><br/> <b>Emilie, The, 385.</b><br/> <b>Emma B., The, 373.</b><br/> <b>Empire, The, 409.</b><br/> <b>Empire Transp. Co. v. Iron Co., 369.</b><br/> <b>Empire State Co. v. Hanley, 424, 425, 426.</b><br/> <b>Emsheimer v. New Orleans, 57.</b><br/> <b>Endner v. Greco, 362.</b><br/> <b>Endleman v. U. S., 318.</b> </p> |
|---|---|

### E

- Eads v. The H. D. Bacon, 405.**  
**Eagle, The, 409.**  
**Earle v. Chesapeake, Etc., R. R. Co., 269.**  
**Early v. Rogers, 445.**

## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| <p> <b>Ensminger v. Powers</b>, 293.<br/> <b>Equitable, Etc., Society v. Brown</b>, 505.<br/> <b>Equitable, Etc., Society v. Talbert</b>, 489.<br/> <b>Equitable Trust Co. Ex parte</b>, 243.<br/> <b>Erie Belle, The</b>, 410.<br/> <b>Erie, Etc., Co. v. Towing Co.</b>, 404.<br/> <b>Erie R. R. Co. v. Purdy</b>, 504.<br/> <b>Erstein v. Rothschild</b>, 169.<br/> <b>Erwin v. U. S.</b>, 305, 330.<br/> <b>Estes v. Trabue</b>, 467.<br/> <b>Ethel, The</b>, 382, 403.<br/> <b>Ethel J., The</b>, 399.<br/> <b>Etheridge v. Sperry</b>, 200, 510.<br/> <b>Eustis v. Bolles</b>, 506.<br/> <b>Evans v. Bank</b>, 476, 490.<br/> <b>Evans v. Gee</b>, 445.<br/> <b>Evans v. Gorman</b>, 229.<br/> <b>Evans v. New York, Etc., Co.</b> 408.<br/> <b>Evans v. U. S.</b>, 314, 342.<br/> <b>Everhard v. Huntsville College</b>, 66.<br/> <b>Evers v. Watson</b>, 20, 128.<br/> <b>Excelsior Wooden Pipe Co. v. Pacific Bridge Co.</b>, 16, 62, 422.         </p> | <p> <b>Fenno v. Primrose</b>, 182.<br/> <b>Fidelity Co. v. Shenandoah Co.</b>, 287.<br/> <b>Fidelity, Etc., Co. v. Buckl</b>, 147.<br/> <b>Fidelity, Etc., Co. v. Huntington</b>, 132.<br/> <b>Fidelity Trust Co. v. Mobile Ry. Co.</b>, 255, 258.<br/> <b>Fiechtl, et al Re</b>, 465.<br/> <b>Field v. Barber Asphalt Co.</b>, 428, 424.<br/> <b>First Nat'l Bank v. Estherville</b>, 506.<br/> <b>First Nat'l Bank v. Omaha</b>, 481.<br/> <b>First National Bank v. Radford</b>, 48.<br/> <b>Fishback v. Western Union</b>, 105, 108.<br/> <b>Fishburn v. Chicago, Etc., R. R. Co.</b>, 171, 456.<br/> <b>Fisher v. Carrico</b>, 496, 497.<br/> <b>Fisk, In re</b>, 176.<br/> <b>Fisk v. Henarie</b>, 151, 153.<br/> <b>Fisk v. R. R. Co.</b>, 229.<br/> <b>Fitts v. McGehee</b>, 6, 8.<br/> <b>Fitzgerald v. Mo. Pac. R. R. Co.</b>, 72.<br/> <b>Fitzpatrick v. Graham</b>, 464, 465.<br/> <b>Fitzpatrick, v. U. S.</b>, 311, 333.<br/> <b>Flanagan v. Sierra County</b>, 198.<br/> <b>Fletcher v. Hamlet</b>, 130.<br/> <b>Florence Oil Co. v. Towboat</b>, 404.<br/> <b>Florida v. Anderson</b>, 80, 249.<br/> <b>Florida v. Georgia</b>, 79, 252.<br/> <b>Flower v. McGinniss</b>, 279.<br/> <b>Folsom v. Township</b>, 199.<br/> <b>Foot v. Parsons, Etc., Co.</b>, 451.<br/> <b>Forbes v. R. R. Co.</b>, 257, 256.<br/> <b>Forbes v. State Council</b>, 502.<br/> <b>Fore River, Etc., Co. v. Hagg</b>, 417, 418.<br/> <b>Forgay v. Conrad</b>, 442, 468, 439.<br/> <b>Forsyth v. Hammond</b>, 198, 431.<br/> <b>Fort Leavenworth v. Lowe</b>, 304.<br/> <b>Foster v. Campagnie Francaise</b>, 402.<br/> <b>Foster v. Kansas</b>, 517.<br/> <b>Foster v. Neilson</b>, 2, 3.<br/> <b>Foster v. U. S.</b>, 178, 338.<br/> <b>Fowler v. Rathbones</b>, 368.<br/> <b>Fox v. Ohio</b>, 305.<br/> <b>Fraenkl v. Cerecedo</b>, 293.         </p> |
|--|--|

### F

- Fair, The, v. Kohler Die Co.**, 418, 422.  
**Fairfield v. Gallatin County**, 198.  
**Fairgreve v. Insurance Co.**, 379.  
**Falls v. Eastin**, 25, 290.  
**Farish v. State Banking Board**, 5.  
**Farmers' Bank v. Greene**, 337.  
**Farmers' Bank v. Hoof**, 106.  
**Farmers Loan, Etc., Co. Ex parte**, 443.  
**Farmers' Loan, Etc., Co. v. Lake street, Etc., Co.**, 85.  
**Farmers' Loan, Etc., Co. v. R. R. Co.**, 255, 476, 484.  
**Farmington v. Pillsbury**, 75.  
**Farney v. Towle**, 504, 505.  
**Farrar v. Churchill**, 474, 486.  
**Fay v. Crozer**, 427.  
**Felbelman v. Packard**, 64, 467.  
**Felix v. Scharnweber**, 514.  
**Felton v. Spiro**, 189, 188.



## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| <p> <b>Frame v. Portland, Etc., Mining Co., 474.</b><br/> <b>France v. U. S., 339.</b><br/> <b>Francis v. Flinn, 128.</b><br/> <b>Franconia, The, 380.</b><br/> <b>Frank G. Fowler, The, 377.</b><br/> <b>Frank v. U. S., 327, 343.</b><br/> <b>Franklin v. U. S., 427.</b><br/> <b>Franklin Bank v. Taylor, 294.</b><br/> <b>Fraser v. Jennison, 130.</b><br/> <b>Fraser v. Washington, 462.</b><br/> <b>Freeman v. Alderson, 24.</b><br/> <b>Freeman v. Howe, 84.</b><br/> <b>Freeman v. U. S., 460, 490.</b><br/> <b>French v. Gapen, 255.</b><br/> <b>French v. Hay, 88, 229.</b><br/> <b>French v. Stewart, 141, 288.</b><br/> <b>Fretz v. Bull, 377, 380.</b><br/> <b>Friend v. Wise, 95.</b><br/> <b>Friendship, The, 369, 380.</b><br/> <b>Fritzler, v. Boatmen's Bank, 143, 151.</b><br/> <b>Frishman v. Culberson, 228.</b><br/> <b>Frow v. de la Vega, 289, 440.</b><br/> <b>Furniss v. The Magoun, 385, 401.</b> </p> <p style="text-align: center;"><b>G</b></p> <p> <b>Gableman v. Peoria Ry. Co., 64, 124, 129.</b><br/> <b>Gage v. Riverside Trust Co., 81.</b><br/> <b>Gaines v. Fuentes, 117.</b><br/> <b>Gaines v. New Orleans, 287.</b><br/> <b>Galpin v. Page, 23.</b><br/> <b>Galveston v. Gonzales, 40.</b><br/> <b>Gamble v. San Diego, 226.</b><br/> <b>Gans, Ex parte, 4.</b><br/> <b>Gardes v. U. S., 319.</b><br/> <b>Gardner v. Bonesteel, 507.</b><br/> <b>Gardner v. R. R. Co., 202.</b><br/> <b>Garland v. U. S., 324.</b><br/> <b>Garland v. Washington, 324.</b><br/> <b>Garner v. Bank, 229.</b><br/> <b>Garnett, Ex parte, 354, 358, 372.</b><br/> <b>Garrard v. Silver Peak Mines, 126.</b><br/> <b>Gasquet v. Fidelity, Etc., Co., 88.</b><br/> <b>Gassman v. Jarvis, 148.</b><br/> <b>Gaun v. Northeastern R. R. Co., 154.</b><br/> <b>Gaumont v. Hatch, 242.</b><br/> <b>Gay v. Hudson River, Etc., Co., 478, 437.</b><br/> <b>Gay Mfg. Co. v. Camp, 287.</b> </p> | <p> <b>Gaylord v. Fort Wayne, Etc., R. R. Co., 228.</b><br/> <b>Gazelle, The, 387, 412.</b><br/> <b>Geer v. Mathieson Co., 45, 131.</b><br/> <b>Gelston v. Hoyt, 518.</b><br/> <b>Gelpcke v. Dubuque, 198.</b><br/> <b>General Bakelite Co. v. Nikolas, 260.</b><br/> <b>General Smith, The, 362.</b><br/> <b>Generes v. Campbell, 458.</b><br/> <b>George Taulane, The, 387.</b><br/> <b>Georgia v. Stanton, 3.</b><br/> <b>Gerling v. B. &amp; O. R. R. Co., 69, 141, 145.</b><br/> <b>Germain v. Mason, 468.</b><br/> <b>German Nat'l Bank v. Speckert, 153, 445.</b><br/> <b>German Savings Society v. Dormitzer, 507.</b><br/> <b>Germania Ins. Co. v. Wisconsin, 81.</b><br/> <b>Ghost v. U. S., 462.</b><br/> <b>Gibbons v. Ogden, 450.</b><br/> <b>Gibbs v. Crandall, 125.</b><br/> <b>Gibson v. Bruce, 122.</b><br/> <b>Gibson v. Lyon, 200.</b><br/> <b>Gibson v. Mississippi, 156.</b><br/> <b>Gibson v. Shufeldt, 95, 96, 98, 106.</b><br/> <b>Gilbert Knapp, The, 366.</b><br/> <b>Gilfillan v. McKee, 468.</b><br/> <b>Gill v. U. S., 339.</b><br/> <b>Gillingham v. Charleston Co., 406.</b><br/> <b>Gilman v. Telegraph Co., 181.</b><br/> <b>Glass v. Concordia Parish, 57.</b><br/> <b>Gleason v. Florida, 513, 516.</b><br/> <b>Glenmont, In re, 362.</b><br/> <b>Glenn v. Sumner, 173.</b><br/> <b>Glenn v. Slaughter, 216.</b><br/> <b>Glickstein v. U. S., 345.</b><br/> <b>Globe, Etc., Co. v. Landa, Oil Co., 418.</b><br/> <b>Glover v. Cooke, 116.</b><br/> <b>Goins v. Southern Pac. Co., 145.</b><br/> <b>Goldey v. Morning News Co., 39, 41.</b><br/> <b>Goldsby v. U. S., 338, 341, 326, 325.</b><br/> <b>Goldschmidt v. Primos Co., 274.</b><br/> <b>Good v. Martin, 21.</b><br/> <b>Goodlet v. L. &amp; N. R. R. Co., 69.</b><br/> <b>Goodman v. Niblack, 36.</b> </p> |
|--|--|

## TABLE OF CASES

(References are to pages.)

- |  |   |
|--|---|
| <p> <b>Goodno v. Hotchkiss</b>, 271, 273.<br/> <b>Goodrich v. Ferris</b>, 427.<br/> <b>Goodwin v. Boston, Etc.. R. R. Co.</b>, 72.<br/> <b>Goodwin v. Fox</b>, 464, 480.<br/> <b>Gordon v. Chattanooga Bank</b>, 80.<br/> <b>Gordon v. Gilfoil</b>, 224.<br/> <b>Gordon v. Longest</b>, 10.<br/> <b>Gordon v. U. S.</b>, 4.<br/> <b>Gorham v. Emery Co.</b>, 464.<br/> <b>Gormley v. Clark</b>, 175, 291.<br/> <b>Gould v. U. S.</b>, 490.<br/> <b>Governor of Georgia v. Slaves</b>, 6.<br/> <b>Graham v. Stucken</b>, 297.<br/> <b>Grand Republic, The</b>, 379.<br/> <b>Grand Trunk R. R. Co. v. Twitchell</b>, 155.<br/> <b>Grannis v. Ordean</b>, 502.<br/> <b>Grant v. Phoenix Ins. Co.</b>, 435, 445.<br/> <b>Grant v. Poillon</b>, 358, 373.<br/> <b>Grant v. Schoonhoven</b>, 242.<br/> <b>Grape Creek Coal Co. v. Farmers' L. &amp; T. Co.</b>, 474.<br/> <b>Grapeshot, The</b>, 266.<br/> <b>Graves v. Corbin</b>, 131, 132, 135.<br/> <b>Gray v. Bldg. Ass'n.</b>, 287.<br/> <b>Gray v. Mercantile Co.</b>, 482.<br/> <b>Great Southern, Etc., Co. v. Jones</b>, 73, 198, 199.<br/> <b>Great Western, The</b>, 372.<br/> <b>Great Western Tel. Co. v. Burnham</b>, 495, 496.<br/> <b>Great Western, Etc., Co. v. Harris</b>, 38.<br/> <b>Great Western Co. v. Purdy</b>, 503.<br/> <b>Gregory v. Pike</b>, 255.<br/> <b>Greeley v. Lowe</b>, 32, 35.<br/> <b>Green v. Biddle</b>, 164.<br/> <b>Green v. C. B. &amp; Q. R. R. Co.</b>, 44, 47.<br/> <b>Green v. City of Lynn</b>, 465.<br/> <b>Green v. Elbert</b>, 490.<br/> <b>Green v. McNeal's Lessee</b>, 199.<br/> <b>Green v. Underwood</b>, 226.<br/> <b>Green v. Van Buskirk</b>, 503, 517.<br/> <b>Green v. Watkins</b>, 470.<br/> <b>Green County v. Thomas</b>, 110.<br/> <b>Greene v. Henkel</b>, 310.<br/> <b>Greene v. U. S.</b>, 324, 340, 342.<br/> <b>Gregg v. Forsyth</b>, 446.                 </p> | <p> <b>Gregg v. Sayre</b>, 456.<br/> <b>Gregory v. Hartley</b>, 153.<br/> <b>Grimes v. Malcolm</b>, 171.<br/> <b>Gross v. U. S. Mortgage Co.</b>, 519.<br/> <b>Guernsey v. Imperial Bank</b>, 201.<br/> <b>Guffey v. Smith</b>, 203, 218.<br/> <b>Guild v. Frontin</b>, 180.<br/> <b>Gulf, Etc., Ry. Co. v. Jackson</b>, 460.<br/> <b>Gumbel v. Pitkin</b>, 84, 89, 436, 471, 473.<br/> <b>Gunby v. Armstrong</b>, 85.<br/> <b>Gunnison County v. Rollins</b>, 457.<br/> <b>Guarantee Co. v. Hanway</b>, 122.<br/> <b>Guaranty Trust Co. v. Met. Street Ry.</b>, 424.<br/> <b>Guardian Trust Co. v. K. C. R. Co.</b>, 226.<br/> <b>Gund Brewing Co. v. U. S.</b>, 309.<br/> <b>Gunter v. Atlantic, Etc., Co.</b>, 5.<br/> <b>Gurnee v. Patrick</b>, 445.<br/> <b>Gwin v. Breedlove</b>, 89.                 </p> <p style="text-align: center;"><b>H</b></p> <p> <b>Haas v. Henkel</b>, 310.<br/> <b>Haberman Mfg. Co., in re</b>, 452.<br/> <b>Habig v. Folger</b>, 23.<br/> <b>Hagar, ex parte</b>, 365.<br/> <b>Hagood v. Southern</b>, 7.<br/> <b>Hagstoz v. Insurance Co.</b>, 265.<br/> <b>Ha Ha, The</b>, 363.<br/> <b>Haire v. Rome R. Co.</b>, 151.<br/> <b>Hale v. Henkel</b>, 314, 334, 310.<br/> <b>Hales v. Michigan</b>, 178.<br/> <b>Hall v. Chattanooga, Etc. Co.</b>, 154.<br/> <b>Hall v. Indiana Mfg. Co.</b>, 17.<br/> <b>Hall v. U. S.</b>, 340.<br/> <b>Halsen v. Lord</b>, 368.<br/> <b>Halstead v. Manning</b>, 265.<br/> <b>Hamblin v. Western Land Co.</b>, 505.<br/> <b>Hamilton v. Brown</b>, 24.<br/> <b>Hamilton v. Kneeland</b>, 516.<br/> <b>Hamblin v. Toledo Ry. Co.</b>, 256.<br/> <b>Hammerstein v. Lyne</b>, 66.<br/> <b>Hampton v. Rouse</b>, 467.<br/> <b>Hancock v. Halbrook</b>, 151.<br/> <b>Handley v. Stutz</b>, 102.<br/> <b>Hanks v. International, Etc., Co.</b>, 176, 177.<br/> <b>Hanrick v. Hanrick</b>, 153, 151.                 </p> |
|--|---|

## TABLE OF CASES

(References are to pages.)

- |  |   |
|--|---|
| Hannis Distilling Co. v. Baltimore, 427.       | Heffelfinger v. Choctaw, Etc., R. R. Co., 125, 129. |
| Hans v. Louisiana, 3.                          | Helke v. U. S., 325, 336, 419.                      |
| Hansen v. Boyd, 457.                           | Hein v. Westinghouse Co., 170.                      |
| Hanson v. Fowle, 392.                          | Henderson v. Carbondale, Etc., Co., 101.            |
| Hardee v. Wilson, 468, 469.                    | Henderson v. Louisville, Etc., R. R. Co., 173.      |
| Hardenbergh v. Ray, 79.                        | Henderson v. Moore, 189, 445.                       |
| Hardin v. Boyd, 275, 445.                      | Henderson v. Wadsworth, 104.                        |
| Harding v. Corn Products Co., 227.             | Hendricks v. U. S., 427.                            |
| Harding v. Illinois, 500.                      | Hendryx v. Perkins, 293.                            |
| Harkrader v. Wadley, 225, 227.                 | Henningsen v. U. S., Fidelity, Etc., Co., 420.      |
| Harlan, Ex parte, 346.                         | Henry v. Dick Co., 16.                              |
| Harland v. Telegraph Co., 35.                  | Hentig v. Page, 448.                                |
| Harless v. U. S., 343, 345.                    | Hepburn v. Elzey, 66.                               |
| Harper v. Bridges, 383.                        | Hepburn v. Griswold, 1.                             |
| Harrington v. R. R. Co., 129.                  | Herbert v. Butler, 458.                             |
| Harris v. Rosenberger, 427.                    | Hermann v. Mill Co., 360.                           |
| Harrisburg, The, v. Richards, 361.             | Herndon v. Chicago, Etc., R. R. Co., 162.           |
| Harrison v. St. Louis, Etc., R. R. Co., 162.   | Herndon v. Southern Ry. Co., 154.                   |
| Harrold v. Oklahoma, 178, 338.                 | Herndon-Carter Co. v. Norris, 41, 422, 417.         |
| Harter v. Kernochan, 128.                      | Herr v. St. Louis, Etc., Ry. Co., 476.              |
| Hartford Fire, Etc., Co. v. R. R. Co., 203.    | Herrman v. Edwards, 63.                             |
| Hartford Ins. Co. v. Van Duzer, 513.           | Hervey v. Midland Co., 82.                          |
| Hartford Life Ins. Co. v. Ibs., 241.           | Hesper, The, 411.                                   |
| Hartog v. Memory, 62.                          | Hewitt v. Filbert, 480, 481, 482.                   |
| Hastorf v. Degnon, 406.                        | Hickory v. U. S., 340.                              |
| Harvey and Henry, The, 364.                    | Hicks v. U. S., 457.                                |
| Haytian Republic, The, 402, 404.               | Higgins v. U. S., 189, 343.                         |
| Haseltine v. Bank, 192, 494, 495, 450.         | Highland Light, The, 406.                           |
| Haskins v. St. Louis, Etc., Ry. Co., 478, 481. | Highlander, The, 364.                               |
| Hatch v. Railway Co., 287.                     | Hill v. Chicago, Etc., R. R. Co., 440.              |
| Havermeyer v. Iowa County, 198.                | Hill v. Eagle Glass Co., 243.                       |
| Havemeyer's Co. v. Compania Espanola, 388.     | Hill v. Gordon, 110.                                |
| Havnor v. New York, 513.                       | Hill v. Phelps, 293.                                |
| Hawaii v. Mankichi, 183.                       | Hill v. The Yacht Amelia, 373.                      |
| Hawgood v. Coal, 369.                          | Hillegrass v. U. S., 321, 323, 324.                 |
| Hax v. Caspar, 129.                            | Hills v. Mendenhall, 23.                            |
| Hayburn's Case, 4.                             | Hinckley v. Railroad Co., 443, 471.                 |
| Hayden v. Androncoggin Mills, 42.              | Hirsh v. Independent Steel Co., 85.                 |
| Hayward v. Nordberg, 122.                      | Hitz v. Jenks, 85.                                  |
| Hecker v. Fowler, 182.                         | Hobart v. Drogan, 365.                              |
| Hedderly v. U. S., 343.                        | Hodgson v. Bower Bank, 81.                          |

# TABLE OF CASES

(References are to pages.)

- Hoeffner v. U. S., 347.  
 Hohart, In re, 26, 441.  
 Hohorst v. Hamburg-American Co., 441.  
 Holder v. Aultman, 428.  
 Holder v. U. S., 186.  
 Hollander v. Heaslip, 85.  
 Hollins v. Brierfield Coal Co., 223.  
 Holloway v. Dunham, 186.  
 Holmes v. Goldsmith, 57.  
 Holmes v. Jennison, 435.  
 Holmgren v. U. S., 47?  
 Holt v. Bergwin, 95.  
 Holt v. Indiana Mfg. Co., 110.  
 Home for Incurables v. New York, 502.  
 Home Land Co. v. McNamara, 287.  
 Home R. R. Co. v. Lincoln, 293.  
 Honolulu Co. v. Hawaii, 4.  
 Hooe v. Jamison, 66, 78.  
 Hope Ins. Co. v. Boardman, 67.  
 Hopkins v. Clemson College, 8.  
 Hopkins v. Hebard, 294.  
 Hopkins v. McLure, 506.  
 Horn v. Pere Marquette Co., 38, 236, 295.  
 Horn Silver Co. v. New York, 162.  
 Hornbuckle v. Toombs, 21, 209.  
 Horner v. U. S., 428, 432.  
 Hough v. R. R. Co., 202.  
 Houseman v. North Carolina, 378.  
 Houston, Etc., R. R. Co. v. Shirley, 130.  
 Houston, Etc., R. R. Co. v. Texas, 124.  
 Howard v. U. S., 74, 64, 330, 430, 305.  
 Hoyle, J. R., The, 388.  
 Hudson v. Parker, 168, 172, 347, 346, 478, 483.  
 Hudson v. Whitmire, 367.  
 Huff v. Bidwell, 102.  
 Hughes v. New York, Etc., R. R. Co., 189.  
 Huguley Mfg. Co. v. Galetton Cotton Mills, 424.  
 Hultberg v. Anderson, 474.  
 Hume v. Bowie, 458.  
 Humes v. U. S., 345.  
 Hunnicutt v. Payton, 459, 460, 463.  
 Hunniston v. Stanthor, 447.  
 Hunt v. New York Cotton Exchange, 107, 228, 224, 231.  
 Hunter v. Mutual Reserve, Etc., Co., 44.  
 Huntington v. Attrill, 119, 503, 300.  
 Huntington v. Laidley, 422.  
 Hurlburt v. Chicago, 504.  
 Huskins v. Cincinnati, Etc., R. Co., 122.  
 Hutchinson v. Philadelphia, Etc., Co., 258.  
 Hutson v. Jordan, 388.  
 Hyams v. Calumet Co., 263.  
 Hyde v. Shine, 310.  
 Hyde v. Victoria Land Co, 126.  
 Hyde v. U. S., 322.
- I
- Ill. Cent. R. R. Co. v. Adams, 102, 105, 263.  
 Illinois Cent. Ry. Co. v. Kentucky, 502.  
 Ill. Cent. R. R. v. Nelson, 178.  
 Ill. Cent. R. R. Co. v. Skeegog, 134, 135, 139.  
 Ill. Cent. R. R. v. Waller, 116.  
 Illinois Steel Co. v. Ramsey, 255.  
 Independent School Dist. v. Hall, 55.  
 Indian, Etc., Co. v. Asheville, Etc., Co., 116.  
 Indiana, Etc., Ry. Co. v. Ins. Co., 470.  
 Indianapolis, Etc., R. R. Co. v. Horst, 170, 173, 189.  
 Inglehart v. Stansbury, 469, 470, 515.  
 Insurance Co., v. Howell, 230.  
 Insurance Co. v. Mordecai, 484.  
 Interior Construction Co. v. Gibney, 422.  
 International Harvester Co. v. Kentucky, 45, 42, 43.  
 Interstate Com. Commission v. Brimson, 9.  
 Iowa v. Rood, 505.  
 Iron, Etc., Co. v. R. R. Co., 445.

## TABLE OF CASES

(References are to pages.)

Iowa, Etc., Co. v. Montgomery  
279, 280.  
Irawaddy, The, 368.  
Iris, The, 363.  
Iron Mountain Co. v. Memphis,  
229.  
Iroquois Transportation Co. v.  
De Laney Co., 362.  
Irvine v. Marshall, 207.  
Isaacs v. U. S., 325, 341.  
Itow v. U. S., 427.

### J

Jackson v. Chew, 199, 202, 203.  
Jackson v. Jackson, 441.  
Jackson v. Steamboat Mag-  
nolia, 358.  
Jackson v. Twentyman, 81.  
Jacobs v. U. S., 338, 481, 482.  
Jacobsen v. Navigation Co.,  
379, 380.  
James v. Evans, 189.  
Janney v. Insurance Co., 371.  
Jefferson, The, 411, 422.  
Jefferson v. Driver, 130.  
Jefferson Bank v. Skelly, 508.  
Jellinek v. Huron Copper Co.,  
36.  
Jenkins, v. York Cliffs Co., 265.  
Jenks v. Brewster, 92.  
Jenks v. Lewis, 387.  
Jennings v. Carson, 394.  
Jennings v. Dolan, 287.  
Jennings v. Philadelphia, Etc.,  
Ry. Co., 458, 460.  
Jewel Tea Co. v. Lee's Sum-  
mit, 229.  
John Bad Elk v. U. S., 306.  
John C. Sweeney, The, 359, 404.  
John E. Mulford, The, 373.  
Johnson, ex parte, 85.  
Johnson v. Christian, 89.  
Johnson v. Computing Scale  
Co., 122.  
Johnson v. Elevator Co., 359.  
Johnson v. Harman, 463.  
Johnson v. Jones, 186.  
Johnson v. Keith, 495.  
Johnson v. Meyers, 487.  
Johnson v. Trust Co., 470.  
Johnson v. Waters, 87.  
Johnston v. Morse, 230.  
Johnston v. U. S., 316.

Jolly v. U. S., 342.  
Jones, In re, 265.  
Jones v. Andrews, 88, 90.  
Jones v. Craig, 449.  
Jones v. East Tenn., Etc., R.R.  
Co., 186.  
Jones v. Gould, 35.  
Jones v. Great Southern Hotel  
Co., 199.  
Jones v. Grover, 458.  
Jones v. League, 76.  
Jones v. Mosher, 122.  
Jones v. Sands, 255.  
Jones v. U. S., 305, 304, 312, 347.  
Jordan, Ex parte, 466.  
Joseph B. Thomas, The, 390.  
Joy v. Adelbert College, 445.  
Joy v. St. Louis, 254, 256.  
Julia, The, 385.  
Julia Blake, The, 366.  
Julian v. Central Trust Co., 91,  
229.  
Jutte v. Davis, 363.

### K

K. No. 1, The, 408.  
Kaiser v. Chi., Etc., R. R. Co.,  
179.  
Kalamazoo, Etc., Co. v. Duff  
Co., 464.  
Kalen v. U. S., 338.  
Kamm v. Stark, 88.  
Kanouse, v. Martin, 79.  
Kansas v. Colorado, 3, 8, 191.  
Kansas City Gas Co. v. Kansas  
City, 229.  
Kansas City, Etc., Company v.  
Daughtry, 41, 139.  
Kansas City, Etc., R. R. Co. v.  
Albers, 507.  
Kansas City, Etc., R. R. v. Her-  
man, 143, 134, 135.  
Kansas City, Etc., R. R. Co. v.  
Leslis, 126.  
Kardo Co. v. Adams, 239.  
Katalla v. Rones, 127.  
Kate Tremaine, The, 366.  
Kaufman v. Smith, 427.  
Kaukauna Power Co. v. Green  
Bay Co., 202.  
Kaye v. U. S., 341.  
Kearney v. Case, 179, 181.

## TABLE OF CASES

(References are to pages.)

- |  |   |
|--|---|
| <p> <b>Keasbey &amp; Mattison Co. Re,</b> 26.<br/> <b>Keen v. Reed,</b> 202.<br/> <b>Keith v. Alger,</b> 231.<br/> <b>Keizo v. Henry,</b> 321.<br/> <b>Kellam v. Keith,</b> 126.<br/> <b>Kellum v. Emerson,</b> 373.<br/> <b>Kelly v. Dolan,</b> 263.<br/> <b>Kelsey v. Forsyth,</b> 180.<br/> <b>Kempe v. Kennedy,</b> 20.<br/> <b>Kendall v. U. S.,</b> 4, 9.<br/> <b>Kennebec, Etc., R. R. Co. v. Portland, Etc., Co.,</b> 506.<br/> <b>Kennedy v. Bank,</b> 293.<br/> <b>Kennett v. Chambers,</b> 3.<br/> <b>Kentucky v. Powers,</b> 20, 496.<br/> <b>Kentucky Distilleries Co. v. Lillard,</b> 460.<br/> <b>Kentucky, Etc., Co. v. Kentucky,</b> 502.<br/> <b>Kentucky Lands Co. v. Mineral Co.,</b> 32.<br/> <b>Kerch v. U. S.,</b> 345.<br/> <b>Kerfoot v. Farmers' Bank,</b> 507.<br/> <b>Kern v. Huidekoper,</b> 90.<br/> <b>Kessinger v. Bradford,</b> 293.<br/> <b>Keystone Co. v. Martin,</b> 436, 447.<br/> <b>Kidder v. Fidelity Insurance Co.,</b> 470.<br/> <b>Kidder v. Northwestern Life Co.,</b> 130.<br/> <b>Kilbourn v. U. S.,</b> 4.<br/> <b>Kimball v. Kimball,</b> 505.<br/> <b>Kimberly v. Arms,</b> 284, 293.<br/> <b>King v. Cornell,</b> 131.<br/> <b>King v. Thompson,</b> 470.<br/> <b>King v. West Virginia,</b> 505.<br/> <b>Kingman v. Western Mfg. Co.,</b> 435, 486, 189, 343, 450.<br/> <b>Kingsbury v. Buckner,</b> 294.<br/> <b>Kinney v. Columbia Savings, Etc., Co.,</b> 122, 126, 145.<br/> <b>Kipley v. Illinois,</b> 504.<br/> <b>Kirby v. American Soda Co.,</b> 107, 109, 123.<br/> <b>Kirby v. Lake Shore, Etc., R. Co.,</b> 207, 221.<br/> <b>Kirby v. U. S.,</b> 315, 329, 330.<br/> <b>Kirkland, The,</b> 373.<br/> <b>Kirkland v. Knox,</b> 85.<br/> <b>Kitchen v. Randolph,</b> 477, 478, 480.         </p> | <p> <b>Klinger v. Missouri,</b> 506.<br/> <b>Knapp, Etc., Co. v. McCaffrey,</b> 15, 217, 365.<br/> <b>Knapp v. Troy, Etc., R. R. Co.</b> 74.<br/> <b>Knickerbocker Ins. Co. v. Pendleton,</b> 54.<br/> <b>Knickerbocker Steamboat Co., In re,</b> 405.<br/> <b>Knight v. Ill. Cent. R. R. Co.,</b> 170.<br/> <b>Knight v. The Attila,</b> 401.<br/> <b>Knox County v. Aspinwall,</b> 89.<br/> <b>Koewing v. Wilder,</b> 460.<br/> <b>Kohl v. U. S.,</b> 118.<br/> <b>Kolze v. Hoadley,</b> 57, 56.<br/> <b>Kreiger v. Shelby, R. R. Co.,</b> 519.<br/> <b>Kreigh v. Westinghouse,</b> 124.<br/> <b>Krippendorf v. Hyde,</b> 86, 89, 256, 437.<br/> <b>Kuhn v. Fairmont Coal Co.,</b> 198, 199, 200, 197.<br/> <b>Kurtz v. Moffit,</b> 108.<br/> <b>Kynoch, The, v. Ives,</b> 373.         </p> <p style="text-align: center;"><b>L</b></p> <p> <b>Labette County v. U. S.,</b> 89.<br/> <b>La Borde v. Ubarri,</b> 35.<br/> <b>La Bourgogne,</b> 372.<br/> <b>Lacassagne v. Chapins,</b> 92.<br/> <b>Ladew v. Cooper Co.,</b> 36, 82, 265.<br/> <b>Lady Pike, The,</b> 412.<br/> <b>Lafayette Ins. Co. v. French,</b> 46.<br/> <b>Lafferty v. Acme, Etc., Co.,</b> 293.<br/> <b>Laher v. Cooper,</b> 456.<br/> <b>Laidly v. Huntington,</b> 153.<br/> <b>Lake Commissioner v. Dudley,</b> 75.<br/> <b>Lake Shore, Etc., R. R. Co. v. Eder,</b> 72.<br/> <b>Lake Shore, Etc., R. R. Co. v. Prentice,</b> 202.<br/> <b>Lambert v. Barrett,</b> 448.<br/> <b>La Montagne v. Harvey,</b> 123, 122.<br/> <b>Lammon v. Feusier,</b> 84.<br/> <b>Land Co. v. Howes,</b> 484.<br/> <b>Landes v. Felton,</b> 125.<br/> <b>Lands v. Cargo of Coal,</b> 365.<br/> <b>Lane v. Vick,</b> 202.<br/> <b>Lane v. Wallace,</b> 497.<br/> <b>Langdon v. Coal Co.,</b> 121.<br/> <b>Lanier v. Nash,</b> 75.         </p> |
|--|---|

## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| <b>Laskey v. Newton Mining Co.,</b><br>265.                | <b>Lobenstein v. Union, Etc., R. R.</b><br>Co., 217.             |
| <b>Lathrop, Etc., Co. v. Interior</b><br>Constr. Co., 143. | <b>Lockman v. Lang,</b> 474, 482.                                |
| <b>La Tourette v. Burton,</b> 384, 380,<br>379.            | <b>Lodge v. Twell,</b> 435, 449.                                 |
| <b>Latta v. Kilbourn,</b> 447.                             | <b>Loeb v. Columbia Township,</b> 55,<br>66, 198, 519, 424, 428. |
| <b>Laurens, The,</b> 384.                                  | <b>Loebler v. Schroeder,</b> 445, 450.                           |
| <b>Lawrence v. Minturn,</b> 378.                           | <b>Loewe v. State Federation,</b> 218.                           |
| <b>Layton v. Missouri,</b> 504.                            | <b>Logan v. Aeolian,</b> 377.                                    |
| <b>Leaf Tobacco Board, In re,</b> 470.                     | <b>Logan v. Patrick,</b> 88, 90.                                 |
| <b>Leary v. U. S.,</b> 254.                                | <b>Logan v. U. S.,</b> 326, 332, 323.                            |
| <b>Leathe, Etc., Co. v. Cooper,</b> 125.                   | <b>Lombard Inv. Co. v. Seaboard</b><br>Mfg. Co., 255, 258.       |
| <b>Leathers v. Blessing,</b> 360.                          | <b>Lottawanna, The,</b> 353, 362, 383.                           |
| <b>Lee v. Ins. Co.,</b> 123.                               | <b>Laughlin v. McCaulley,</b> 355.                               |
| <b>Lee v. Johnson,</b> 519.                                | <b>Louisiana v. Jumel,</b> 7.                                    |
| <b>Lee v. Thompson,</b> 393.                               | <b>Louisiana, Etc., Ry. Co. v. Behr-</b><br>man, 508.            |
| <b>Lees v. U. S.,</b> 345, 456.                            | <b>Louisiana Nat'l Bank v. Whit-</b><br>ney, 445.                |
| <b>Lehigh Mining Co., Re,</b> 420, 421,<br>422.            | <b>Louisiana Navigation Co. v.</b><br>Oyster Commission, 494.    |
| <b>Lehigh Mining Co. v. Kelly,</b> 76.                     | <b>Louisville, Etc., Ry. Co., Ide,</b> 132.                      |
| <b>Lehigh Valley R. R. Co. v.</b><br>Steamboat Co., 411.   | <b>Louisville, Etc., Ry. Co. v. Let-</b><br>son, 67, 6.          |
| <b>Lehman v. Lang,</b> 480.                                | <b>Louisville, Etc., R. R. Co. v. Mel-</b><br>ton, 505.          |
| <b>Lehman v. U. S.,</b> 318.                               | <b>Louisville, Etc., R. R. Co. v.</b><br>Siler, 10.              |
| <b>Lena Mowbray, The,</b> 364.                             | <b>Louisville, Etc., R. R. Co., v.</b><br>Smith, 504.            |
| <b>Lennon, Ex parte,</b> 61.                               | <b>Louisville, Etc., R. R. Co., v.</b><br>Trust Co., 532, 79.    |
| <b>Leon v. Galceran,</b> 15.                               | <b>Louisville, Etc., R. R. Co., v.</b><br>Wangelin, 131, 132.    |
| <b>Lewis v. R. R. Co.,</b> 256.                            | <b>Louisville, Etc., R. R. Co., v.</b><br>Western Union Co., 35. |
| <b>Lewis v. U. S.,</b> 344, 456, 328.                      | <b>Louisville, Etc., R. R. Co., v.</b><br>Woodford, 504.         |
| <b>Libby v. Crossley,</b> 459.                             | <b>Louisville Trust Co. v. Knott,</b><br>418.                    |
| <b>Life Ins. Co. v. Wilson,</b> 189.                       | <b>Louisville Trust Co. v. Stockton,</b><br>464, 465, 486.       |
| <b>Lincoln v. Clafin,</b> 456.                             | <b>Louisville Underwriters, Ex</b><br>parte, 26.                 |
| <b>Lincoln v. Power,</b> 170, 172.                         | <b>Lopez, The,</b> 399.  |
| <b>Lincoln County v. Luning,</b> 66.                       | <b>Loveless v. Ransom,</b> 464, 469,<br>470.                     |
| <b>Linden, Etc., Co. v. Houstain,</b> 274.                 | <b>Low v. U. S.,</b> 327.  |
| <b>Lindley v. National, Etc., Co.,</b><br>229.             | <b>Lowden v. U. S.,</b> 322.                                     |
| <b>Lindrup, The,</b> 404, 403.                             | <b>Lowenstein v. Glidewell,</b> 88.                              |
| <b>Lipke, In re,</b> 297.                                  | <b>Lowlands, The,</b> 403.                                       |
| <b>Lippincott v. Mitchell,</b> 216.                        | <b>Lowndes v. Huntington,</b> 173, 203.                          |
| <b>Little v. Bowers,</b> 505.                              |  |
| <b>Little v. Giles,</b> 75, 132.                           |  |
| <b>Little v. Hanner,</b> 241.                              |  |
| <b>Littlefield v. Perry,</b> 17.                           |  |
| <b>Little York, Etc., Co. v. Keyes,</b><br>111, 121.       |  |
| <b>Liverpool, Etc., Co. v. Phoenix,</b><br>Etc., Co., 201. |  |
| <b>Livingston, The,</b> 384.                               |  |
| <b>Livingston v. Story,</b> 163, 207.                      |  |
| <b>Lloyd v. Fulton,</b> 216.                               |  |

## TABLE OF CASES

(References are to pages.)

Lowry v. Story, 170.  
 Lowry v. Tile, Etc., Ass'n, 265.  
 Lucas v. Brooks, 475.  
 Lucille, The, 411.  
 Lumber Co. v. Ott, 218.  
 Lund v. Chi., Etc., R. R. Co., 125.  
 Lunt, The J. B. v. Merritt, 373.  
 Lupton v. Automobile Club, 182.  
 Luten v. Camp, 278.  
 Luther v. Borden, 3.  
 Luxton v. North River, Etc., Co., 169.  
 Lyman v. The Willard, 373.  
 Lyman D. Foster, The, 382.  
 Lynch v. Bailey, 95.  
 Lyon v. Clark, 192.

### M

McAllister v. U. S., 21.  
 McArthur v. Scott, 241.  
 McCabe v. Wilson, 186.  
 McCain v. Des Moines, 62.  
 McCall, In re, 477.  
 McCandless v. Pratt, 506.  
 McCargo v. Chapman, 445.  
 McCarley v. McGhee, 484.  
 McClaine v. Rankin, 194.  
 McClellan v. Carland, 228.  
 McComb v. Commissioners, 496.  
 McConihay v. Wright, 222.  
 McCormick v. Sullivant, 20.  
 McCorquodale v. Texas, 502.  
 McCourt v. Singers-Biggars, 466.  
 McCulloch v. Maryland, 1.  
 McDaniel v. Traylor, 35, 102.  
 McDonald v. Harvey, 487.  
 McDonald v. Mallory, 301.  
 McDonald v. Massachusetts, 519.  
 McDonald v. Nebraska, 187.  
 McDonnell v. Jordan, 153.  
 McElroy v. U. S., 320.  
 McFadden v. U. S., 424, 429, 432.  
 McFarland v. Bank, 288.  
 McFarland v. Brown, 435.  
 McGourkey v. Toledo, Etc., R. Co., 435, 436, 447.  
 McGrégor v. U. S., 320, 322.  
 McGuire v. Blount, 184.  
 McGuire v. Massachusetts, 518.  
 McKay v. Kalyton, 502.  
 McKenna v. Flisk, 32.  
 McKenzie, In re, 452, 484.  
 McKinley v. Morrish, 378, 387.

McKnight v. James, 448.  
 McKnight v. U. S., 178, 333, 338, 346.  
 McKown v. Coal Co., 123.  
 McLaughlin v. Hallowell, 73.  
 McLaughlin v. Fowler, 507.  
 McLish v. Roff, 419.  
 McMicken v. Perrin, 287.  
 McNeil, Ex parte, 365.  
 McNeil v. Holbrook, 175.  
 McNeill v. Southern Ry. Co., 107.  
 McNulta v. Locheridge, 510.  
 McNulta v. West Park Commissioners, 470.  
 McNutt v. Bland, 74, 249.  
 McWilliams v. Steam Tug, 388.  
 Mabey, The, 412.  
 Mackin v. U. S., 311.  
 Macomber v. Thompson, 364.  
 Madison County v. Warren, 181.  
 Madisonville, Etc., Co. v. St. Bernard, Etc., Co., 138, 118, 120, 121, 139, 228.  
 Magann v. Segal, 471.  
 Magruder v. Belle Fourche, 240.  
 Maguire v. Card, 353.  
 Maher v. Tower Hotel Co., 152.  
 Mahoning Valley R. R. Co. v. O'Hara, 459, 460.  
 Main, The, 366.  
 Maine v. Gilman, 123.  
 Maisonnaire v. Keating, 366.  
 Maitland v. The Atlantic, 366.  
 Mallers v. Commercial Loan Co., 504.  
 Mallinckrodt v. Missouri, 502.  
 Malone v. Richmond, Etc., R. R. Co., 150.  
 Malony v. Adsit, 458.  
 Mamie, The, 103.  
 Manchester v. Massachusetts, 300, 301.  
 Manhattan Life Ins. Co. v. Cohen, 505.  
 Mankato v. Barber Asphalt Co., 226.  
 Mann v. Dempster, 189.  
 Manning v. Amy, 140.  
 Manning v. Berdan, 88.  
 Manning v. Ins. Co., 189.  
 Manro v. Almeida, 393, 392.  
 Manufacturers Com. Co. v. Brown, Etc., Co., 136.



## TABLE OF CASES

(References are to pages.)

- |   |   |
|---|---|
| <p>Manufacturing Co. v. Broderick, 122.<br/> Marbury v. Madison, 2, 19.<br/> Marconi Co. v. National Co., 271.<br/> Margaret, The, 388.<br/> Marks v. Marks, 66.<br/> Marks v. N. P. Ry. Co., 486.<br/> Marmann v. The William Windom, 362.<br/> Marsh v. Nichols, 17.<br/> Marshall v. Baltimore, Etc., R. R. Co., 67.<br/> Marshall v. Bazin, 365.<br/> Marshall v. Dye, 506.<br/> Marshall v. Holmes, 87, 110, 115, 139, 231.<br/> Martha, The, 401.<br/> Martha Anne, The, 381.<br/> Martin v. Buford, 480.<br/> Martin v. Hunter's Lessee, 4, 9, 10, 517.<br/> Martin v. St. Louis, Etc., R. R. Co.; 125.<br/> Martin v. Trout, 504.<br/> Martin v. Walker, 388.<br/> Martin v. West, 359.<br/> Martinez v. International Banking Corp., 106, 449.<br/> Mary Garrett, The, 360.<br/> Mary Stewart, The, 360.<br/> Marye v. Parsons, 4.<br/> Maryland v. Baldwin, 74.<br/> Mason v. Marine Ins. Co., 384.<br/> Mason v. U. S., 467.<br/> Mason City, Etc., Co. v. Boynton, 128.<br/> Massie v. Watts, 25.<br/> Masterson v. Howard, 467, 468, 469.<br/> Mattingly v. N. W. R. R. Co., 126, 480.<br/> Mattox v. U. S., 189, 343, 329.<br/> Maxey v. U. S., 330.<br/> Maxwell v. Dow, 183.<br/> Maxwell Co. v. National Casket Co., 261, 260.<br/> May v. U. S., 328.<br/> Maynard v. Hecht, 421, 419.<br/> Meagher v. Minnesota, Etc., Mfg. Co., 450, 495.<br/> Mechanical Appliance Co. v. Castleman, 39, 148, 172, 417, 422.</p> | <p>Meche v. Valley Mining Co., 47.<br/> Meldrum v. U. S., 345.<br/> Mellen v. Moline, 35, 256.<br/> Memphis v. Brown, 450, 486.<br/> Memphis, Etc., R. R. Co. v. Alabama, 72.<br/> Memphis Savings Bank v. Houchins, 85.<br/> Mendenhall v. Hall, 482.<br/> Mercantile Trust Co. v. Atlantic, Etc., Co., 254.<br/> Merchant, The, 382.<br/> Merchants' Ass'n v. U. S., 240.<br/> Merchants', Etc., Co. v. Ins. Co., 131, 133.<br/> Merchants' Ins. Co. v. Buckner, 460.<br/> Merchants' Stock and Grain Co., Re, 438.<br/> Merrill v. Bank, 450.<br/> Merritt v. Barge Co., 226.<br/> Merritt v. Chubb, 402.<br/> Merriweather v. Muhlenberg County, 198.<br/> Messenger v. Anderson, 198.<br/> Metcalf v. Watertown, 79, 60.<br/> Metropolitan R. R. Co. v. McFarland, 458.<br/> Mex. Central R. R. Co. v. Eckman, 75, 57, 420, 418.<br/> Mexican Cent. Ry. Co. v. Pinkney, 80, 169, 170, 265.<br/> Mexican Nat. Ry. Co. v. Davidson, 120.<br/> Mexican Prince, The, 408.<br/> Meyer v. Herrera, 265.<br/> Meyer v. Pacific Mail Co., 373.<br/> Meyer v. Tupper, 362.<br/> Michigan, Etc., Co. v. Aluminum, Etc., Co., 194.<br/> Michigan, Etc., R. R. Co. v. Powers, 197.<br/> Michigan Ins. Co. v. Eldred, 459, 461.<br/> Michigan Sugar Co. v. Dix, 498.<br/> Middleton v. McGrew, 203.<br/> Miedreich v. Lauenstein, 502.<br/> Miller v. Bank, 129.<br/> Miller v. Clifford, 129.<br/> Miller v. Cornwall R. R. Co., 509.<br/> Miller v. East Side, Etc., Co., 76.<br/> Miller v. Joseph, 496.<br/> Miller v. Morgan, 459.</p> |
|---|---|

# TABLE OF CASES

(References are to pages.)

- Miller v. U. S.**, 399, 400.  
**Milligan, Ex parte**, 115.  
**Millinger v. Hartupée**, 505, 509.  
**Mills, Ex parte**, 311.  
**Mills v. Green**, 505.  
**Milwaukee, Etc., R. R. Co., v. Chamberlain**, 91.  
**Milwaukee, Etc., R. R. Co. v. R. R. Commission**, 198.  
**Milwaukee, Etc., R. R. Co. v. Soutter**, 89, 88, 85.  
**Mina v. Floria**, 403.  
**Minahan v. Grand Trunk Ry. Co.**, 462.  
**Minneapolis v. Reum**, 65.  
**Minneapolis, Etc., Co. v. Transit Co.**, 368.  
**Minnesota v. Northern Sec. Co.**, 31, 62, 80, 81, 124, 125.  
**Minnetonka, The**, 409.  
**Minturn v. Alexander**, 377.  
**Minturn v. Maynard**, 373.  
**Mississippi, Etc., Commission v. I. C. R. R. Co.**, 7, 424.  
**Mississippi, Etc., Co. v. Patterson**, 118.  
**Mississippi, Etc., R. R. Co. v. Ward**, 32.  
**Mississippi Valley Mills v. Cohn**, 56.  
**Missouri v. Dockery**, 506.  
**Missouri v. Illinois**, 3.  
**Missouri, Etc., Co. v. Krumseig**, 213.  
**Missouri, Etc., R. R. Co. v. Castle**, 70.  
**Missouri, Etc., R. R. Co. v. Chicago, Etc., R. R. Co.**, 189, 171.  
**Missouri, Etc., R. R. Co. v. Elliott**, 499, 501, 502.  
**Missouri, Etc., R. R. Co. v. Fitzgerald**, 146, 139.  
**Missouri, Etc., R. R. Co. v. Hickman**, 126.  
**Missouri, Etc., R. R. Co. v. Meeh**, 72.  
**Missouri, Etc., Ry. Co. v. Olathe**, 450.  
**Missouri, Etc., R. R. Co. v. Russell**, 459, 460.  
**Mitchell Coal Co. v. Penn. Ry. Co.**, 418.  
**Missouri Valley Co. v. Wiese**, 513.  
**Mobile, Etc., R. R. Co. v. Jurey**, 186.  
**Mobile, Etc., R. R. Co. v. Tennessee**, 508.  
**Mollan v. Torrance**, 79.  
**Monongahela Distillery Co., In re**, 197.  
**Monongahela, Etc., Coke Co. v. Schinnerer**, 361.  
**Monongahela Nav. Co. v. Connell**, 366.  
**Montalet v. Murray**, 81.  
**Montana v. Rice**, 502.  
**Monte, A., The**, 365, 381, 409, 403.  
**Montgomery v. Liebenthal**, 40.  
**Monticello v. Morrison**, 378.  
**Moore, In re**, 124.  
**Moore v. Bank**, 456.  
**Moore v. U. S.**, 300, 343.  
**Moore-Mansfield Co. v. Electrical Co.**, 424, 425.  
**Morewood v. Enequist**, 365.  
**Morey v. Lockhart**, 146.  
**Morgan v. De Arrogetul**, 404.  
**Morgan v. Morgan**, 79.  
**Morgan v. Thornhill**, 448.  
**Morgan v. U. S.**, 337, 322.  
**Morgan's L. & T. Co. v. Texas, Etc., Co.**, 91, 83.  
**Morrill v. American, Etc., Co.**, 38.  
**Morris v. Gilmer**, 79, 76, 62.  
**Morrisdale Coal Co. v. Penn. Ry. Co.**, 420.  
**Morrison v. Burnette**, 463.  
**Morsell v. Hall**, 446.  
**Moses v. National Bank**, 194.  
**Moses Taylor, The. v. Hammons**, 11, 15, 365, 496.  
**Mossman v. Higginson**, 81.  
**Motes v. U. S.**, 328, 432.  
**Mott v. Frost**, 388.  
**Mountain View v. McFadden**, 125.  
**Mower v. Fletcher**, 449, 450.  
**Mullen v. Western, Etc., Co.**, 496, 497.  
**Muller v. Dows**, 25, 73, 67.  
**Muller v. Ehlers**, 458.  
**Municipal Investment Co. v. Gardner**, 265.

# TABLE OF CASES

(References are to pages.)

- Munson v. Miramor S. S. Co., 413, 410.  
Murdock v. Memphis, 506, 507, 512, 519.  
Murphy v. John Hofman, 83.  
Murray v. Louisiana, 156.  
Murray v. Wilson Distilling Co., 8.  
Muse v. Arlington, 427.  
Muskrat v. U. S., 2, 4, 9.  
Mussina v. Cavazos, 467, 484.  
Mutual Accident Ass'n v. Davis, 43.  
Mutual, Etc., Ass'n v. Phelps, 45.  
Mutual Ins. Co. v. Brune, 224.  
Mutual Ins. Co. v. The George, 377.  
Mutual Life, Etc., Co. v. McGrew, 499, 503, 504.  
Mutual Life, Etc., Co. v. Phinney, 484.  
Mutual Reserve Co. v. Hunter, 44, 45.  
Myers v. Fenn, 255.  
Myers v. Swan, 151.  
Myrick v. R. R. Co., 201.  
Myrick v. Thompson, 507.  
Myrtle v. Nevada, 122.  
Myrtle M. Ross, The, 474.
- N.
- Nail City, The, 378.  
Nalle v. Oyster, 455.  
Nashua Bank v. Anglo, Etc., Co., 175.  
Nashville. Etc., Co. v. Barnum, 182.  
Nashville v. Cooper, 10, 20, 58.  
National Bank v. Smith, 435.  
National Bank of Commerce v. Bank, 479.  
National Cash, Etc., Co., v. Le-land, 176.  
National Electric Co. v. Telefunken, 256.  
National Enameling Co., Ex parte, 451, 448, 442.  
National Steamship Co. v. Tugman, 144, 139.  
National Surety Co. v. Bank, 231.  
National Underwriters v. Melchers, 368.  
Nations v. Johnson, 466.
- Nazima Trading Co. v. Martin, 482.  
Neall v. Curran, 380.  
Nebraska, ex parte, 126.  
Neely v. Henkel, 3.  
Neillson v. Lagow, 510.  
Nelson v. Maloney, 146.  
Nelson v. U. S., 438.  
Neves v. Scott, 207.  
New England, The, 413.  
New England Ins. Co. v. Dunham, 352, 358, 365.  
New England Mtge. Co. v. Gay, 109.  
N. J. Steam, Etc., Co. v. Bank, 352, 353, 357, 365.  
New Mexico v. Baker, 45.  
New Orleans v. Benjamin, 56, 62.  
New Orleans v. Fisher, 90, 292.  
New Orleans v. Gaines Admr., 57, 74, 75.  
New Orleans, Etc., R. R. Co. v. Mississippi, 115.  
New Orleans v. Water Works Co., 505.  
New Orleans v. Winter, 78, 66.  
New Orleans Water Works Co. v. Louisiana, 505.  
New Orleans Water Works Co. v. Sugar Co., 506.  
New Providence v. Halsey, 55.  
New York, The, 413.  
New York, Etc., Co., Ex parte, 408.  
New York, Etc., Co. v. Lombard, 217.  
New York, Etc., Co. v. Memphis, Etc., Co., 222.  
New York, Etc., Co. v. Subway Co., 508.  
New York Life Ins. Co. v. Rankin, 473.  
New York, Etc., R. R. Co. v. Estill, 47.  
New York, Etc., R. R. Co. v. Hyde, 459.  
New York, Etc., R. R. Co. v. Lockwood, 201.  
Newburyport v Newburyport Co., 427.  
Newcomb v. Wood, 171, 182.  
Newell v. Norton, 378.  
Newport News Co. v. Pace. 456.

# TABLE OF CASES

(References are to pages.)

- Nichols v. Franson, 419.  
 Nome & Sinook Co. v. Ames, 480, 482.  
 Norfolk v. Virginia, 497.  
 Norfolk, Etc., R. R. Co. v. Earnest, 186.  
 North America, The, 364.  
 North American, Etc., Co. v. Morrison, 56, 109.  
 North Carolina, Etc., Co. v. Zachary, 502.  
 North Star, The, 382.  
 Northern Indiana, Etc., R. R. Co. v. R. R. Co., 32.  
 Northern Pac. Co. v. Austin, 122.  
 Northern Pac. R. R. Co. v. Hambly, 202.  
 Northern Pacific R. R. Co. v. Meese, 200.  
 Northern Pacific R. R. Co. v. North Dakota, 507.  
 Northern Pac. R. R. Co. v. Payne, 172.  
 Norton v. Switzer, 364, 356.  
 Northwestern, Etc., Co. v. Brock, 90.  
 Northwestern, Etc., Co. v. Great Lakes Co., 475.  
 Northwestern, Etc., Co. v. Ins. Co., 513.  
 Northwestern University v. People, 508.  
 Norwich, Etc., Co. v. Wright, 372.  
 Novelty, Etc., Co. v. Buser, 293.  
 Noyes v. Canada, 35.  
 Nudd v. Burrows, 170.  
 Nurnberger v. U. S., 338.  
 Nyack, The, 410, 413.

## O

- O'Brien v. Bags of Guano, 406.  
 O'Brien v. Miller, 372, 409.  
 O'Brien v. Wheelock, 198.  
 O'Callaghan v. O'Brien, 117, 427.  
 O'Connell v. Pennsylvania, Etc., Co., 178.  
 O'Connell v. Reed, 169.  
 O'Dowd v. Russell, 469, 484, 515, 517.  
 O'Hare, Ex parte, 303.  
 O'Neill v. Mining Co., 246, 244.  
 O'Reilly v. Edrington, 478.

- O'Sullivan v. Felix, 194.  
 Oates v. National Bank, 201.  
 Ober v. Gallagher, 203, 217.  
 Ocean Belle, The, 373, 370.  
 Ocean Spray, The, 364.  
 Oceano, The, 406.  
 Oelrichs v. Williams, 222.  
 Oglesby v. Attrill, 92.  
 Ohio R. R. Co. v. Central Trust Co., 289.  
 Ohio, Etc., R. R. Co. v. Wheeler, 67, 71.  
 Olcott v. Bynum, 214.  
 Olcott v. Supervisors, 198.  
 Old Colony Trust Co. v. Omaha, 216.  
 Old Concord, The, 385.  
 Old Dominion S. S. Co. v. Gilmore, 352, 301, 361, 355, 372.  
 Old Nick Williams v. U. S., 463, 473, 485, 345.  
 Old Wagon, Etc., Ass'n v. McDonough, 46.  
 Oliver v. Alexander, 98.  
 Oliver v. Parlin, 228.  
 Omaha Electric, Etc., Co. v. Omaha, 165.  
 Omaha, Etc., Co. v. Wade, 79.  
 Oregon, The, 385, 380.  
 Oregon Ry. Co. v. Balfour, 411.  
 Origet v. U. S., 458.  
 Orvis v. Powell, 203, 217.  
 Osborn v. Bank, 60, 10, 9, 5, 2.  
 Oscoda, The, 365.  
 Ottumwa Box Car Co. v. Christy Co., 464.  
 Our Friend, The, 390.  
 Owings v. Kincannon, 467, 468.  
 Oxford, Etc., Co. v. Bank, 459.  
 Oxley Stave Co. v. Butler County, 499.

## P

- Pacific, The, 365.  
 Pacific Bank v. Hannah, 461.  
 Pacific, Etc., Co. v. Anderson, 377.  
 Pacific Live Stock Co. v. Lewis, 228.  
 Pacific R. R. Co. v. Ketchum, 128, 78.  
 Pac. R. R. Co. v. Mo. Pac. Ry. Co., 91, 88.

## TABLE OF CASES

(References are to pages.)

- |   |  |
|---|--|
| <p><b>Pacific States, Etc., Co. v. Oregon,</b> 3.</p> <p><b>Pacific Whaling Co. v. U. S.,</b> 117.</p> <p><b>Paducah v. East Tenn. Tel. Co.,</b> 449.</p> <p><b>Paine v. Standard, Etc., Co.,</b> 182.</p> <p><b>Palmer v. Barrett,</b> 304.</p> <p><b>Palmer v. Donner,</b> 516.</p> <p><b>Palmer v. Texas,</b> 85.</p> <p><b>Panama R. R. Co. v. Shipping Co.,</b> 360.</p> <p><b>Paquete Habana, The,</b> 429, 311.</p> <p><b>Paradox, The,</b> 362.</p> <p><b>Paraiso v. U. S.,</b> 473, 345, 427.</p> <p><b>Park v. N. Y., Etc., R. R. Co.,</b> 83.</p> <p><b>Parker v. Ornsby,</b> 56.</p> <p><b>Parker v. Overman,</b> 145.</p> <p><b>Parker v. Vanderbilt,</b> 155.</p> <p><b>Parks v. Ross,</b> 184.</p> <p><b>Parks v. Turner,</b> 187.</p> <p><b>Parmalee v. Lawrence,</b> 504.</p> <p><b>Parsons v. Bedford,</b> 208 454.</p> <p><b>Parsons v. Lyman,</b> 242.</p> <p><b>Patch v. Wabash R. R. Co.,</b> 72, 70.</p> <p><b>Patchin v. Hunter,</b> 129.</p> <p><b>Paterson v. Dakin,</b> 373.</p> <p><b>Patterson v. McLaughlin,</b> 297.</p> <p><b>Paul v. B. &amp; O. R. R. Co.,</b> 72.</p> <p><b>Pauline, The,</b> 404, 402.</p> <p><b>Payne v. Hook,</b> 207.</p> <p><b>Payne v. Niles,</b> 470.</p> <p><b>Peale v. Marion Coal Co.,</b> 265.</p> <p><b>Pearce, in re,</b> 286.</p> <p><b>Pease v. Rathbun, Etc., Co.,</b> 290.</p> <p><b>Peck v. Jenness,</b> 225.</p> <p><b>Pelton v. Bank,</b> 197.</p> <p><b>Pembina, Etc., Co. v. Pennsylvania,</b> 162.</p> <p><b>Pender v. Brown,</b> 482.</p> <p><b>Peninsular Iron Co. v. Stone,</b> 133, 78.</p> <p><b>Penn Mutual Co. v. Austin,</b> 428.</p> <p><b>Pennoyer v. Neff,</b> 23, 301.</p> <p><b>Pennsylvania Co., in re,</b> 153, 152, 150, 146.</p> <p><b>Pennsylvania v. Quicksilver Co.,</b> 80.</p> <p><b>Pennsylvania R. R. Co. v. Bender,</b> 153.</p> <p><b>Pennsylvania, Etc., R. R. Co. v. Meyer,</b> 45, 43.</p> | <p><b>Pennsylvania R. R. Co. v. St. Louis, Etc., R. R. Co.,</b> 69.</p> <p><b>Pensacola Tel. Co. v. Western Union Co.,</b> 162.</p> <p><b>People's Bank v. Calhoun,</b> 83.</p> <p><b>People's Bank v. Goodwin,</b> 65.</p> <p><b>People's, Etc., Co. v. Chicago,</b> 226.</p> <p><b>People's Ferry Co. v. Beers,</b> 362, 358.</p> <p><b>Perez v. Fernandez,</b> 35.</p> <p><b>Perkins v. Pourpignet,</b> 288.</p> <p><b>Perry v. Haines,</b> 362, 303.</p> <p><b>Peters v. Gilchrist,</b> 199.</p> <p><b>Peters v. U. S.,</b> 338, 314.</p> <p><b>Peterson v. C. R. I. &amp; P. Ry. Co.,</b> 45, 44, 41.</p> <p><b>Pettit v. Walshe,</b> 308.</p> <p><b>Peugh v. Davis,</b> 476.</p> <p><b>Peyton v. Desmond,</b> 33.</p> <p><b>Peyton v. Robinson,</b> 95.</p> <p><b>Phelps v. Oaks,</b> 171, 169, 79.</p> <p><b>Philadelphia, Etc., Co. v. Fehelmer,</b> 182.</p> <p><b>Philadelphia, Etc., R. R. Co. v. Towboat Co.,</b> 360, 358.</p> <p><b>Philadelphia, The,</b> 410.</p> <p><b>Phillips, Etc., Co. v. Seymour,</b> 173, 474.</p> <p><b>Phillips v. U. S.,</b> 324.</p> <p><b>Phoenix, The,</b> 390.</p> <p><b>Phoenix Ins. Co., ex parte,</b> 372.</p> <p><b>Phoenix Ins. Co. v. Erie Transp. Co.,</b> 377.</p> <p><b>Phoenix Ins. Co. v. Pechner,</b> 138.</p> <p><b>Phoenix Ins. Co. v. Raddin,</b> 456.</p> <p><b>Pickands, The H. S.,</b> 360.</p> <p><b>Pickett v. Ledgerwood,</b> 446.</p> <p><b>Picquet v. Swan,</b> 23.</p> <p><b>Pierce v. Cox,</b> 465.</p> <p><b>Pierce v. U. S.,</b> 319.</p> <p><b>Pirie v. Twedt,</b> 132.</p> <p><b>Pittsburgh, Etc., Co. v. B. &amp; O. Ry. Co.,</b> 129.</p> <p><b>Pittsburgh, Etc., R. R. Co. v. Ramsey,</b> 80.</p> <p><b>Pittsburgh Gas Co. v. Goff-Kirby Co.,</b> 461, 463.</p> <p><b>Pittsburg Heater Co. v. Beler,</b> 269, 260.</p> <p><b>Plant Investment Co. v. Ry. Co.,</b> 57.</p> <p><b>Plauder, Etc., Co. v. Giles,</b> 271.</p> <p><b>Plymouth, The,</b> 359, 358.</p> |
|---|--|

## TABLE OF CASES

(References are to pages.)

- |   |  |
|---|--|
| <p> <b>Plymouth, Etc., Co. v. Amador,</b><br/>             135, 132.<br/> <b>P. M. Co. v. Ajax Co.,</b> 278.<br/> <b>Poindexter v. Greenhow,</b> 7.<br/> <b>Pointer v. U. S.,</b> 328, 322.<br/> <b>Polk's Lessee v. Wendell,</b> 10.<br/> <b>Polleys v. Black River, Etc., Co.,</b><br/>             485, 486, 519.<br/> <b>Polydore v. Prince,</b> 390.<br/> <b>Pomeroy's Lessee v. Bank,</b> 455,<br/>             456, 457.<br/> <b>Pooler v. Hyne,</b> 482.<br/> <b>Pooler v. U. S.,</b> 323.<br/> <b>Pope v. Louisville, Etc., R. R.</b><br/> <b>Co.,</b> 92, 91, 64.<br/> <b>Pope v. Seckworth,</b> 393.<br/> <b>Port Victor, The,</b> 367.<br/> <b>Porter v. Sabin,</b> 93, 83.<br/> <b>Portland Pipe Co. v. Slick,</b> 270.<br/> <b>Portsmouth, The, v. Salt Co.,</b><br/>             368.<br/> <b>Post v. U. S.,</b> 324.<br/> <b>Postal, Etc., Co. v. Alabama,</b> 66,<br/>             124, 126.<br/> <b>Postal, Etc., Co. v. Southern Ry.</b><br/> <b>Co.,</b> 121.<br/> <b>Potomac, The,</b> 377.<br/> <b>Potomac, Etc., Co. v. B. &amp; O. R.</b><br/> <b>R. Co.,</b> 33.<br/> <b>Potts, in re,</b> 293.<br/> <b>Poultney v. Lafayette,</b> 165.<br/> <b>Pounds v. U. S.,</b> 314.<br/> <b>Powers v. Chesapeake, Etc., Co.,</b><br/>             123, 132, 138, 140, 146, 145, 142.<br/> <b>Powers v. Kentucky,</b> 156.<br/> <b>Powers v. U. S.,</b> 333.<br/> <b>Pratt v. Paris, Etc., Co.,</b> 16.<br/> <b>Pratt v. Thomas,</b> 381.<br/> <b>Preble v. Bates,</b> 462.<br/> <b>Prentiss v. Coast Line,</b> 231.<br/> <b>Prentiss v. Brennan,</b> 66, 65.<br/> <b>Press Pub. Co. v. Monroe,</b> 429,<br/>             428.<br/> <b>Prettyman v. U. S.,</b> 337.<br/> <b>Price v. Ellis,</b> 116, 122, 123.<br/> <b>Price v. Henkel,</b> 310.<br/> <b>Price v. McCarty,</b> 310, 309.<br/> <b>Price v. Pennsylvania, Etc., Co.,</b><br/>             64.<br/> <b>Prichard v. Budd,</b> 475.<br/> <b>Prigg v. Commonwealth,</b> 307.<br/> <b>Prince v. Lehman,</b> 404, 402.<br/> <b>Prince George, The,</b> 364.<br/> <b>Prindeville, The,</b> 402.         </p> | <p> <b>Prinz Georg, The,</b> 380.<br/> <b>Propeller Commerce, The,</b> 387.<br/> <b>Propeller Monticello v. Mollison,</b><br/>             384, 383.<br/> <b>Prout v. Starr,</b> 227, 225.<br/> <b>Providence Rubber Co. v. Good-</b><br/> <b>year,</b> 88, 294, 476, 486.<br/> <b>Providence Steamship Co. v.</b><br/> <b>Hill,</b> 372.<br/> <b>Provident, Etc., Co. v. Camden,</b><br/>             289.<br/> <b>Provident Society v. Ford,</b> 75.<br/> <b>Prudence, The,</b> 387.<br/> <b>Prussia, The,</b> 379, 377.<br/> <b>Pullman, Etc., Co. v. Kansas,</b><br/>             162.<br/> <b>Pullman, Etc., Co. v. Knott,</b> 197.<br/> <b>Pullman, Etc., Co. v. Washburn,</b><br/>             89.<br/> <b>Put-in-Bay Waterworks v. Ryan,</b><br/>             108, 62.<br/> <b>Putnam v. Ingraham,</b> 133, 129.<br/> <b>Putnam v. U. S.,</b> 338.         </p> <p style="text-align: center;"><b>Q</b></p> <p> <b>Queen, The,</b> 380, 385.<br/> <b>Queen of the Pacific,</b> 365, 404.<br/> <b>Quincy v. Steele,</b> 263.<br/> <b>Quincy Bridge Co. v. Adams</b><br/> <b>County,</b> 72.<br/> <b>Quinn v. The Transport,</b> 402.         </p> <p style="text-align: center;"><b>R</b></p> <p> <b>Radford v. Folsom,</b> 481.<br/> <b>Radford v. U. S.,</b> 328.<br/> <b>Raich v. Truax,</b> 241.<br/> <b>Railroad Commission v. L. &amp; N.</b><br/> <b>R. R. Co.,</b> 423.<br/> <b>Railroad Commission v. Worth-</b><br/> <b>ington,</b> 424, 430.<br/> <b>Railroad Co. v. Bradleys,</b> 465.<br/> <b>Railway Telegraphers v. L. &amp; N.</b><br/> <b>R. Co.,</b> 121.<br/> <b>Rakes v. U. S.,</b> 427.<br/> <b>Ralli v. Troop,</b> 352, 367.<br/> <b>Ralston, in re,</b> 465, 518.<br/> <b>Ralston Steel Car Co. v. Car Co.,</b><br/>             268.<br/> <b>Randall v. Baltimore, Etc., R.</b><br/> <b>R. Co.,</b> 202.<br/> <b>Randall v. Foglesang,</b> 486.<br/> <b>Randall v. Sprague,</b> 369.<br/> <b>Raphael v. Trask,</b> 73.         </p> |
|---|--|

## TABLE OF CASES

(References are to pages.)

- |  |   |
|--|---|
| <p>Raymond v. Compagnie Generale, 390.</p> <p>Reagan v. Farmers L. &amp; T. Co., 4, 8.</p> <p>Reagan v. U. S., 333.</p> <p>Rector v. Alcorn, 465.</p> <p>Rector v. Fitzgerald, 293.</p> <p>Red River, Etc., Co., v. Needham, 108.</p> <p>Reed v. Gardner, 455.</p> <p>Reed v. Hussey, 381.</p> <p>Reed v. Stanley, 293.</p> <p>Reg. v. Keyn, 13.</p> <p>Reld v. American Express Co., 413.</p> <p>Reld v. U. S., 325, 330.</p> <p>Reilly v. Golding, 90.</p> <p>Reliable Incubator Co. v. Stahl, 460, 463.</p> <p>Remington v. Cent. Pac. Ry. Co., 417, 45, 142, 141.</p> <p>Republican River Bridge Co. v. Kansas, Etc., R. R. Co., 507.</p> <p>Res Publica v. Cobet, 118.</p> <p>Resurrection, Etc., Co. v. Fortune, Etc., Co., 178.</p> <p>Reuben Dowd, The, 406.</p> <p>Reusens, The G., 373.</p> <p>Reynes v. Dumont, 223.</p> <p>Reynolds v. First National Bank, 213.</p> <p>Reynolds v. U. S., 329, 21.</p> <p>R. I. v. Massachusetts, 1, 2, 3, 19.</p> <p>Rice v. Houston, 74.</p> <p>Rice v. Sanger, 450, 495.</p> <p>Rich v. Lambert, 380, 387.</p> <p>Richard Doane, The, 379.</p> <p>Richards v. U. S., 341.</p> <p>Richardson v. Green, 480, 481, 482, 490.</p> <p>Richardson, Etc., v. Hennessy, 82.</p> <p>Richardson v. McChesney, 506.</p> <p>Richmond v. Copper Co., 379.</p> <p>Richmond v. Smith, 179.</p> <p>Richmond, Etc., Ry. Co. v. Thouron, 445.</p> <p>Ricker v. Powell, 293, 294.</p> <p>Rickey v. Miller, 225, 227, 228.</p> <p>Riggs v. Clark, 122.</p> <p>Riggs v. Johnson County, 89, 225.</p> <p>Rike v. Floyd, 154.</p> <p>Riley v. Iron Pipe, 369.</p> <p>Rimmerman v. U. S., 315.</p> | <p>Rio Grande, Etc., v. Gildersleeve, 165.</p> <p>Rio Grande, Etc., Co. v. Stringham, 496.</p> <p>Ripper v. U. S., 339, 341.</p> <p>Ritchie v. McMullen, 275.</p> <p>Riverdale Mills v. Alabama, Etc., Co., 20, 87, 91, 229.</p> <p>Rives v. Virginia, 156.</p> <p>Roach v. Chapman, 362.</p> <p>Roanoke, The, 354, 356.</p> <p>Robert W. Parsons, The, 358.</p> <p>Roberts v. Bennett, 461.</p> <p>Roberts v. Bowles, 197.</p> <p>Roberts v. Kendrick, 477.</p> <p>Roberts v. Lewis, 173.</p> <p>Roberts v. Pacific, Etc., Co., 82, 146.</p> <p>Roberts v. Skolfield, 381.</p> <p>Robertson, in re, 514, 516.</p> <p>Robertson v. Baldwin, 8, 307.</p> <p>Robertson v. Cease, 66, 80.</p> <p>Robertson v. Perkins, 173.</p> <p>Robins, Etc., Co. v. Chesbrough, 413.</p> <p>Robinson v. Anderson, 62.</p> <p>Robinson v. Brick Co., 108.</p> <p>Robinson v. Caldwell, 419.</p> <p>Robinson v. Campbell, 208.</p> <p>Robinson v. Parker-Washington Co., 123.</p> <p>Roby v. Colehour, 504.</p> <p>Rock Island Bridge, The, 358.</p> <p>Rodgers v. Pitt, 227.</p> <p>Rodriguez v. U. S., 344, 456.</p> <p>Rogers v. Hennepin County, 502.</p> <p>Rogers v. Hurney, 382.</p> <p>Rogers v. Penobscot, Etc., Co., 246, 129.</p> <p>Rogers v. U. S., 181, 340.</p> <p>Rollman v. Hardware Works, 285, 287.</p> <p>Romaine v. Insurance Co., 268.</p> <p>Roney v. Chase, Etc., Co., 406.</p> <p>Rooney v. U. S., 322.</p> <p>Root v. Lake Shore, etc., R. R. Co., 208.</p> <p>Root v. Woolworth, 88, 91, 92, 291.</p> <p>Rosen v. U. S., 315.</p> <p>Rosenbaum v. Bower, 89.</p> <p>Rosenthal v. Coates, 151.</p> <p>Ross v. Iron Co., 263.</p> <p>Ross v. Prentiss, 106.</p> |
|--|---|

## TABLE OF CASES

(References are to pages.)

- |   |   |
|---|---|
| <p> <b>Rostrom v. Waterwitch, 399.</b><br/> <b>Rothschild v. Knight, 519.</b><br/> <b>Rothschild v. Steger, 192.</b><br/> <b>Rounds v. Cloverport, Etc., Co., 15.</b><br/> <b>Rouse v. Letcher, 85, 91.</b><br/> <b>Rowe v. Phelps, 473.</b><br/> <b>Rubel v. Beaver Falls, 269.</b><br/> <b>Ruggles v. Patton, 444.</b><br/> <b>Rumbell, The J. E., 362.</b><br/> <b>Rundle v. Delaware, Etc., Co., 202.</b><br/> <b>Russell v. Clark's Executors, 31.</b><br/> <b>Russell v. Shippen, 263.</b><br/> <b>Russell v. Southard, 207.</b><br/> <b>Ruth, The, 380.</b><br/> <b>Rutherford v. Ins. Co., 188.</b><br/> <b>Ryan v. Ohmer, 82.</b> </p> | <p> <b>Sabine, The, 367.</b><br/> <b>Safford v. People, 230.</b><br/> <b>Safter v. U. S., 338.</b><br/> <b>Sage v. Central R. R. Co., 443, 465, 470, 477, 481, 486.</b><br/> <b>Sageman v. Brandywine, 364.</b><br/> <b>Sailor Prince, The, 373.</b><br/> <b>Sanborn, in re, 4.</b><br/> <b>Sanford, The C. B., 406.</b><br/> <b>Sanford v. Portsmouth, 170.</b><br/> <b>Sanford v. Embry, 288.</b><br/> <b>Sanford v. White, 189.</b><br/> <b>San Jose Land, Etc., Co. v. Ranch Co., 502.</b><br/> <b>San Pedro, Etc., Co. v. U. S., 445.</b><br/> <b>San Rafael, The, 409, 413.</b><br/> <b>Sarah, The, 371.</b><br/> <b>Sarah Ann, The, 387.</b><br/> <b>Sarah E. Kennedy, The, 382.</b><br/> <b>Sargeant's Lessee v. Biddle, 176.</b><br/> <b>Sauer v. New York, 193, 507.</b><br/> <b>Saumurez v. Saumurez, 242.</b><br/> <b>Sauntry v. U. S., 338.</b><br/> <b>Savannah v. Jessup, 437, 471.</b><br/> <b>Sawin v. Kenny, 173.</b><br/> <b>Sawyer v. Piper, 505.</b><br/> <b>Sawyer v. U. S., 333.</b><br/> <b>Sayword v. Denny, 503.</b><br/> <b>Scaife v. Western, Etc., Co., 462.</b><br/> <b>Scarborough v. Pargoud, 485.</b><br/> <b>Scatcherd v. Love, 194.</b><br/> <b>Schatz v. Winton, 179.</b><br/> <b>Schick v. U. S., 327.</b><br/> <b>Schlosser v. Hemphill, 494, 495, 450.</b><br/> <b>Schollenberger, ex parte, 67.</b><br/> <b>School District v. Hall, 474.</b><br/> <b>Schooner Betsy, The, 371.</b><br/> <b>Schooner Lewers, The, v. Kekanoha, 361.</b><br/> <b>Schooner Navarro, The, 402.</b><br/> <b>Schraubstadler v. U. S., 341.</b><br/> <b>Schuchardt v. Allen, 184.</b><br/> <b>Schuchardt v. The Angeliue, 363.</b><br/> <b>Schuchardt v. Babbage, 383.</b><br/> <b>Schultz v. U. S., 341.</b><br/> <b>Schulz v. Bosman, 363.</b><br/> <b>Schunk v. Moline Co., 109, 110, 418.</b><br/> <b>Schwenk v. Strange, 152.</b><br/> <b>Scott v. Armstrong, 172.</b><br/> <b>Scott v. Donald, 8, 109, 241.</b><br/> <b>Scott v. Oil Co., 269.</b> </p> |
|---|---|
- S**
- |  |   |
|--|---|
| <p> <b>St. Charles v. Stookey, 170, 174.</b><br/> <b>St. Clair v. Cox, 40, 41, 46.</b><br/> <b>St. Clair v. U. S., 172, 338, 341.</b><br/> <b>St. David, The, 361.</b><br/> <b>St. John, The, 378.</b><br/> <b>St. Joseph, Etc., R. R. Co. v. Steele, 71.</b><br/> <b>St. Lawrence, The, 380.</b><br/> <b>St. Louis S. W. Ry. Co. v. Alexander, 42, 43.</b><br/> <b>St. Louis, Etc., Co. v. American Cotton Co., 420.</b><br/> <b>St. Louis, Etc., Co. v. Bellamy, 291.</b><br/> <b>St. Louis, Etc., Co. v. Edison Co., 182.</b><br/> <b>St. Louis, Etc., R. R. Co. v. Express Co., 435.</b><br/> <b>St. Louis, Etc., Co. v. Hesterly, 502.</b><br/> <b>St. Louis, Etc., R. R. Co. v. James, 67, 69, 71.</b><br/> <b>St. Louis, Etc., R. R. Co. v. McBride, 265.</b><br/> <b>St. Louis, Etc., Ry. Co. v. Southern Express Co., 444.</b><br/> <b>St. Louis, Etc., R. R. Co. v. Terre Haute Co., 197.</b><br/> <b>St. Louis, Etc., Co. v. Vickers, 170, 185.</b><br/> <b>St. Louis, Etc., R. R. Co. v. Wabash R. R. Co., 431.</b><br/> <b>St. Paul, Etc., R. R. Co. v. McLean, 145.</b> </p> | <p> <b>Sabine, The, 367.</b><br/> <b>Safford v. People, 230.</b><br/> <b>Safter v. U. S., 338.</b><br/> <b>Sage v. Central R. R. Co., 443, 465, 470, 477, 481, 486.</b><br/> <b>Sageman v. Brandywine, 364.</b><br/> <b>Sailor Prince, The, 373.</b><br/> <b>Sanborn, in re, 4.</b><br/> <b>Sanford, The C. B., 406.</b><br/> <b>Sanford v. Portsmouth, 170.</b><br/> <b>Sanford v. Embry, 288.</b><br/> <b>Sanford v. White, 189.</b><br/> <b>San Jose Land, Etc., Co. v. Ranch Co., 502.</b><br/> <b>San Pedro, Etc., Co. v. U. S., 445.</b><br/> <b>San Rafael, The, 409, 413.</b><br/> <b>Sarah, The, 371.</b><br/> <b>Sarah Ann, The, 387.</b><br/> <b>Sarah E. Kennedy, The, 382.</b><br/> <b>Sargeant's Lessee v. Biddle, 176.</b><br/> <b>Sauer v. New York, 193, 507.</b><br/> <b>Saumurez v. Saumurez, 242.</b><br/> <b>Sauntry v. U. S., 338.</b><br/> <b>Savannah v. Jessup, 437, 471.</b><br/> <b>Sawin v. Kenny, 173.</b><br/> <b>Sawyer v. Piper, 505.</b><br/> <b>Sawyer v. U. S., 333.</b><br/> <b>Sayword v. Denny, 503.</b><br/> <b>Scaife v. Western, Etc., Co., 462.</b><br/> <b>Scarborough v. Pargoud, 485.</b><br/> <b>Scatcherd v. Love, 194.</b><br/> <b>Schatz v. Winton, 179.</b><br/> <b>Schick v. U. S., 327.</b><br/> <b>Schlosser v. Hemphill, 494, 495, 450.</b><br/> <b>Schollenberger, ex parte, 67.</b><br/> <b>School District v. Hall, 474.</b><br/> <b>Schooner Betsy, The, 371.</b><br/> <b>Schooner Lewers, The, v. Kekanoha, 361.</b><br/> <b>Schooner Navarro, The, 402.</b><br/> <b>Schraubstadler v. U. S., 341.</b><br/> <b>Schuchardt v. Allen, 184.</b><br/> <b>Schuchardt v. The Angeliue, 363.</b><br/> <b>Schuchardt v. Babbage, 383.</b><br/> <b>Schultz v. U. S., 341.</b><br/> <b>Schulz v. Bosman, 363.</b><br/> <b>Schunk v. Moline Co., 109, 110, 418.</b><br/> <b>Schwenk v. Strange, 152.</b><br/> <b>Scott v. Armstrong, 172.</b><br/> <b>Scott v. Donald, 8, 109, 241.</b><br/> <b>Scott v. Oil Co., 269.</b> </p> |
|--|---|



## TABLE OF CASES

(References are to pages.)

- |  |  |
|--|--|
| <p> <b>Scott v. Sandford</b>, 8, 65.<br/> <b>Scotland, The</b>, 372.<br/> <b>Scotten v. Littlefield</b>, 293.<br/> <b>Scriven v. North</b>, 438.<br/> <b>Seaboard Air Line v. Duvall</b>, 503, 504.<br/> <b>Seaboard Air Line v. Horton</b>, 516.<br/> <b>Searl v. School District</b>, 118.<br/> <b>Searles v. Jacksonville R. R. Co.</b>, 255, 295.<br/> <b>Seare v. Wills</b>, 368.<br/> <b>Seattle v. Trust Co.</b>, 290.<br/> <b>Seaver v. Bigelow</b>, 101.<br/> <b>Segee v. Thomas</b>, 88.<br/> <b>Segrist v. Crabtree</b>, 479.<br/> <b>Seminole, The</b>, 402, 404.<br/> <b>Seneca, The</b>, 370.<br/> <b>Sere v. Pitot</b>, 57.<br/> <b>Sessions v. Johnson</b>, 470.<br/> <b>Sewing Machine Cos., Case of</b>, 20.<br/> <b>Seymour v. Freer</b>, 476.<br/> <b>Shainwald v. Lewis</b>, 297.<br/> <b>Sharon v. Terry</b>, 225, 227, 229.<br/> <b>Shauer v. Alterton</b>, 475.<br/> <b>Shaw, ex parte</b>, 40.<br/> <b>Shaw v. Frey</b>, 230.<br/> <b>Shaw v. Quincy Mining Co.</b>, 67, 265.<br/> <b>Sheeler v. Alexander</b>, 291.<br/> <b>Sheffield v. Gordon</b>, 287, 288.<br/> <b>Sheffield Iron Co. v. Newman</b>, 250.<br/> <b>Shelbyville v. Glover</b>, 452.<br/> <b>Sheldon v. Clifton</b>, 468.<br/> <b>Sheldon v. Keokuk</b>, 135.<br/> <b>Sheldon v. Sill</b>, 20, 55, 56.<br/> <b>Sheldrake v. The Chatfield</b>, 383.<br/> <b>Shelp v. U. S.</b>, 324, 341.<br/> <b>Shepard v. Adams</b>, 170, 174, 417.<br/> <b>Sheridan v. Furbur</b>, 364.<br/> <b>Sherwood v. Newport News Co.</b>, 127.<br/> <b>Shewan v. Hallenbeck</b>, 392.<br/> <b>Shields v. Barrow</b>, 31, 244, 245, 255, 272.<br/> <b>Shields v. Coleman</b>, 421.<br/> <b>Shields v. Thomas</b>, 97, 103.<br/> <b>Shipman v. Mining Co.</b>, 181, 182.<br/> <b>Shoecraft v. Bloxham</b>, 55.<br/> <b>Short v. U. S.</b>, 339.<br/> <b>Shreve v. Cheesman</b>, 463.<br/> <b>Shreveport v. Cole</b>, 62.         </p> | <p> <b>Shulthis v. McDougal</b>, 63.<br/> <b>Sidney, The</b>, 377.<br/> <b>Sidway v. Missouri Stock Co.</b>, 126.<br/> <b>Siler v. L. &amp; N. R. R. Co.</b>, 61.<br/> <b>Silver King Company v. Mining Co.</b>, 246.<br/> <b>Silvester v. U. S.</b>, 341.<br/> <b>Simms v. Guthrie</b>, 89.<br/> <b>Simmons v. U. S.</b>, 340.<br/> <b>Simon, ex parte</b>, 231.<br/> <b>Simon v. Southern Ry. Co.</b>, 46.<br/> <b>Simpson v. Baker</b>, 378.<br/> <b>Simpson v. Bank</b>, 465, 466.<br/> <b>Simpson v. Greely</b>, 467, 515.<br/> <b>Simpson v. U. S.</b>, 339.<br/> <b>Singer Mfg. Co. v. Wright</b>, 4.<br/> <b>Sioux City, Etc., v. Trust Co.</b>, 198, 246.<br/> <b>Siren, The</b>, 353.<br/> <b>Skillinger, The</b>, 382.<br/> <b>Skrine v. Sloop Hope</b>, 370.<br/> <b>Skylark, The</b>, 383.<br/> <b>Sladen v. New York Life Co.</b>, 475.<br/> <b>Slaughter v. Glenn</b>, 203.<br/> <b>Slaughter House Cases</b>, 65, 517.<br/> <b>Slocum v. Ins. Co.</b>, 184.<br/> <b>Sloop Merchant, The</b>, 380, 381.<br/> <b>Smith, in re</b>, 325.<br/> <b>Smith v. Adams</b>, 107, 108, 110, 450, 495.<br/> <b>Smith v. Babcock</b>, 275.<br/> <b>Smith v. Crosby Lumber Co.</b>, 154.<br/> <b>Smith v. Ferst</b>, 465.<br/> <b>Smith v. Gale</b>, 486.<br/> <b>Smith v. Hopkins</b>, 475.<br/> <b>Smith v. Indiana</b>, 506.<br/> <b>Smith v. Lyon</b>, 78.<br/> <b>Smith v. McKay</b>, 418.<br/> <b>Smith v. Reeves</b>, 6, 7.<br/> <b>Smith v. Swormstedt</b>, 241.<br/> <b>Smith v. Vulcan Iron Works</b>, 447, 451.<br/> <b>Smith v. Whitney</b>, 108.<br/> <b>Smithers v. Smith</b>, 109, 418, 110.<br/> <b>Smoot v. Heyl</b>, 510.<br/> <b>Smyth v. Ames</b>, 8, 222.<br/> <b>Snare v. Friedman</b>, 200.<br/> <b>Snow v. Edwards</b>, 400.<br/> <b>Snyder v. U. S.</b>, 341.<br/> <b>Sonnentheil v. Brewing Co.</b>, 64.<br/> <b>Southard v. Russell</b>, 293, 294.         </p> |
|--|--|

## TABLE OF CASES

(References are to pages.)

- |   |  |
|---|--|
| <p>South Carolina v. Seymour, 510.<br/> South Dakota Ry. Co. v. Chicago, Etc., Co., 121.<br/> South Dakota v. North Carolina, 75.<br/> South, Etc., R. R. Co., ex parte, 444.<br/> South Ottawa v. Perkins, 199.<br/> Southern B. &amp; L. Co. v. Carey, 463, 466.<br/> Southern Cash Register Co. v. Register Co., 121.<br/> Southern Pacific Co. v. Arlington, 265.<br/> Southern Pacific Co. v. California, 81.<br/> Southern Pac. Co. v. Denton, 46, 169, 170, 171, 173, 265.<br/> Southern Pacific Co. v. Johnson, 459.<br/> Southern Pac. Co. v. Temple, 289.<br/> Southern R. R. Co. v. Allison, 69.<br/> Southern Ry. Co. v. Briscoe, 66.<br/> Southern R. R. Co. v. Carson, 132.<br/> Southern R. R. Co. v. Lloyd, 126, 134.<br/> Southern R. R. Co. v. Miller, 148.<br/> Southern Ry. Co. v. Telegraph Co., 495.<br/> Southern R. R. Co. v. Thomason, 151.<br/> Southern Realty Co. v. Walker, 76.<br/> Southwestern Surety Co. v. Wells, 265, 267.<br/> Sparf v. U. S., 337, 338, 339, 340, 318.<br/> Spark, The, v. Lee Loi Chum, 386.<br/> Sparks v. Oklahoma, 337.<br/> Spear v. Place, 103.<br/> Speckert v. National Bank, 130.<br/> Speldel v. Barstow, 278.<br/> Spencer v. U. S., 328.<br/> Spies, ex parte, 514, 516.<br/> Spokane Valley Co. v. Kottenai County, 110.<br/> Spreckels Sugar Co. v. McClain, 424, 429, 430.<br/> Springville City v. Thomas, 183.<br/> Staffords v. King, 424.<br/> Stalker v. Pullman Co., 127.</p> | <p>Standard Paint Co. v. Trinidad Co., 430.<br/> Standley v. Roberts, 227.<br/> Stanley County v. Coler, 199.<br/> Stanley v. Schwalbey, 497, 510.<br/> Stanton v. Embry, 224.<br/> Starin v. New York, 60.<br/> Star of Hope, 368.<br/> Starr v. Chicago, Etc., R. Co., 226.<br/> Starr v. U. S., 340.<br/> State ex rel v. Board of Liquidation, 506.<br/> State v. Main, 301.<br/> State Lumber Co. v. Kingfield, 259.<br/> Statler v. U. S., 341.<br/> Steamboat Burns v. Reynolds, 386.<br/> Steamboat Louisville, The, 411.<br/> Steamboat Morgan v. Kouns, 409.<br/> Steamboat Orleans, The, v. Phoebus, 364, 370.<br/> Steamer Paris, The, 378.<br/> Steamer Zephyr v. Brown, 413.<br/> Steamship Douro v. U. S., 466.<br/> Steamship Zodiac, 382.<br/> Stearns v. Minnesota, 508.<br/> Stearns v. U. S., 339, 344.<br/> Steers v. U. S., 340.<br/> Steigleder v. McQuestin, 66.<br/> Steines v. Franklin County, 445.<br/> Stephen Morgan, The, 388.<br/> Stephens v. Smartt, 129.<br/> Stevens v. M. K. &amp; T. R. R. Co., 279.<br/> Stevens v. Nichols, 122, 126.<br/> Stewart v. Masterson, 439, 465.<br/> Stewart v. U. S., 326.<br/> Stimpson v. Westchester R. R. Co., 456.<br/> Stinson v. Dousman, 107.<br/> Stirlen v. U. S., 338.<br/> Stokes v. Williams, 443.<br/> Stoddard v. Head, 394.<br/> Stone v. Murphy, 392, 393.<br/> Stone v. South Carolina, 81, 138, 139.<br/> Storm v. U. S., 454.<br/> Story v. Livingston, 286.<br/> Story v. Story, 463.<br/> Strabo, The, 360.<br/> Strassberger v. Beecher, 122.</p> |
|---|--|

## TABLE OF CASES

(References are to pages.)

Strathnairn, The, 357.  
 Stratton v. Dewey, 449.  
 Stratton v. Jarvis, 103.  
 Strauder v. West Virginia, 156.  
 Strawbridge v. Curtis, 78.  
 Stretch v. Stretch, 255.  
 Stuart v. St. Paul, 289.  
 Stupp, in re, 306.  
 Stutsman, in re, 120, 136.  
 Sullivan v. Texas, 497, 502.  
 Sultana, The, 364.  
 Sun Mutual Ins. Co. v. Ocean Ins. Co., 412.  
 Sun, Etc., Ins. Co. v. Transportation Co., 388.  
 Sun Printing Ass'n v. Edwards, 80.  
 Superior v. Ripley.  
 Supervisors v. Kennicott, 179.  
 Sutherland v. Pierce, 480.  
 Suydam v. Williamson, 203, 454, 455, 457.  
 Swan, in re, 344.  
 Swett v. Black, 377.  
 Swift v. Jones, 182.  
 Swift v. Smith, 218.  
 Swift v. Tyson, 199, 202, 195, 196.

### T

Tacoma v. Wright, 154, 155.  
 Talbot v. Press Pub. Co., 459, 460.  
 Talbot v. Wakeman, 380.  
 Tarbell's case, 301.  
 Taylor v. Carryl, 84.  
 Taylor v. Easton, 293.  
 Taylor v. Ludlow Saylor Co., 260.  
 Taylor v. Savage, 470.  
 Taylor v. Taintor, 225, 229.  
 Taylor v. U. S., 338, 432.  
 Taylor v. Ypsilanti, 198.  
 Teaser, The, 404, 405.  
 Tebo v. New York, 367.  
 Telluride Power Co. v. Rio Grande, Etc., Co., 509.  
 Tennessee v. Condon, 506.  
 Tennessee v. Davis, 60, 157, 306.  
 Tenn. v. Union & Planters Bank, 59, 115, 120, 124.  
 Terre Haute v. Evansville Ry. Co., 120.  
 Terrell v. Allison, 291.  
 Terry v. Bank, 293.  
 Terry v. Sharon, 443.  
 Terry v. Sturtevant, 271.  
 Terry v. U. S., 320.  
 Tex. & Pac. Ry. Co. v. Barrett, 125.  
 Texas & Pacific R. R. Co. v. Cody, 63, 125, 129.  
 Tex. & Pac. R. R. Co. v. Cox, 64, 457.  
 Texas, Etc., R. R. Co. v. Easton, 140.  
 Texas & Pac. Ry. Co. v. Gentry, 98, 449.  
 Texas, Etc., R. R. Co. v. Humble, 147.  
 Texas, Etc., R. Co. v. Kuteman, 229.  
 Texas, Etc., Ry. Co. v. Murphy, 450, 486.  
 Texas, Etc., Co. v. Seeligson, 136.  
 Texas, Etc., Co. v. Starnes, 148.  
 Thames, The, v. Seaman, 378.  
 Thayer v. Spratt, 507.  
 Thiede v. Utah, 338.  
 Thomas Melville, The, 409.  
 Thomas P. Sheldon, The, 381.  
 Thomas v. Anderson, 250.  
 Thomas v. Board of Trustees, 73.  
 Thomas v. Kosciusko, 385.  
 Thomas v. Lane, 381.  
 Thomas v. Thorwegen, 390.  
 Thompson v. Fairbanks, 200.  
 Thompson v. Jachin, 379.  
 Thompson v. Southern Ry. Co., 110.  
 Thompson v. Utah, 183.  
 Thomson v. Wooster, 289.  
 Thorpe v. Sampson, 226.  
 Thouron v. East Tenn., Etc., R. Co., 154.  
 Thullen v. Triumph Electric Co., 296.  
 Thurber v. Miller, 125.  
 Tiernan v. Chicago Ins. Co., 182.  
 Tierney v. Halvetia, Etc., Co., 47.  
 Tilden v. Barker, 266.  
 Tilton, The, 369.  
 Times, Etc., Co. v. Carlisle, 170.  
 Tinsley v. Treat, 310.  
 Tioga R. R. Co. v. Blossburg, 23.  
 Title Guaranty, Etc., Co. v. U. S., 477.  
 Todd v. Daniel, 468.

# TABLE OF CASES

(References are to pages.)

- Toland v. Sprague, 35, 38, 46, 446.  
Toler v. East Tenn. Ry. Co., 255.  
Tom Tong, ex parte, 118.  
275 Tons of Phosphate, 369.  
Tornanses v. Melsing, 484.  
Torrence v. Shedd, 131, 132, 136.  
Tracey v. Morel, 131.  
Tracy v. Morel, 82.  
Trader, The, 377.  
Trafton v. U. S., 342, 343.  
Trauffer v. Navigation Co., 361.  
Treat v. Standard Co., 428.  
Tremper v. Schwabacher, 129.  
Tripp v. Santa Rosa, Etc., Co., 483, 517.  
Trowbridge, The C. C., 373.  
Troy Bank v. Whitehead, 99.  
Troy Factory v. Corning, 287.  
Trustees v. Coppett, 192.  
Trustees v. Greenough, 443.  
Tucker v. Alexandroff, 362.  
Tucker v. U. S., 456.  
Tullis v. Lake Erie, Etc., Ry. Co., 460.  
Tully v. Triangle, 242.  
Tupino v. Compania General, 95.  
Tupper v. Wise, 95.  
Turner v. Bank, 20.  
Turner v. Lumber Co., 106.  
Turner v. The Superior, 364.  
Turner v. U. S., 338, 344.  
Tuttle v. Clafin, 449.  
Twitchell v. Pennsylvania, 513, 514.  
Two Marys, The, 382.  
Tyler, ex parte, 84, 85.  
Tyler, re, 197.  
Tyler v. Judges, 435.  
Tyler v. Savage, 223.
- U
- Ucayali, The, 403.  
Union, The, 373.  
Union Bank v. Kansas, Etc., Bank, 216.  
Union, Etc., Bank v. Memphis, 419, 424.  
Union, Etc., Ins. Co. v. Kirchoff, 495.  
Union Mutual Co. v. Kirchoff, 450.  
Union Pac. R. R. Co. v. Board, 222.  
Union Pac. R. R. Co. v. Botsford, 176.  
Union Pac. Ry. Co. v. Callaghan, 476.  
Union Pacific R. Co. v. Myers, 118.  
Union Sulphur Co. v. Freeport Co., 267, 277.  
Union Terminal Ry. Co. v. Chicago, Etc., Co., 120.  
United Shores, The, 362.  
United States, ex parte, 344.  
U. S. v. Adams, 315.  
U. S. v. Adams Express Co., 323, 432.  
U. S. v. Agnew, 313.  
U. S. v. Alberty, 38.  
U. S. v. Allred, 308.  
U. S. v. American Bell, Etc., Co., 430.  
U. S. v. Angell, 330.  
U. S. v. Ayers, 314, 328.  
U. S. v. Batiste, 340.  
U. S. v. Baumert, 308.  
U. S. v. Baxter, 485.  
U. S. v. Bayand, 315, 322.  
U. S. v. Beatty, 431.  
U. S. v. Bell Telephone Co., 269.  
U. S. v. Bennett, 322.  
U. S. v. Bernays, 474.  
U. S. v. Bevans, 301.  
U. S. v. Biggs, 432.  
U. S. v. Bitty, 432.  
U. S. v. Boarman, 470.  
U. S. v. Brace, 324.  
U. S. v. Brawner, 309, 310.  
U. S. v. Breitling, 165, 456, 461.  
U. S. v. Britton, 300.  
U. S. v. Cadwallader, 323.  
U. S. v. Cameron, 330.  
U. S. v. Campbell, 310.  
U. S. v. Carr, 459.  
U. S. v. Carll, 314.  
U. S. v. Carter, 432.  
U. S. v. Casks of Wine, 382, 386.  
U. S. v. Celestine, 432.  
U. S. v. Chaires, 328.  
U. S. v. Claasen, 343.  
U. S. v. Clune, 320.

# TABLE OF CASES

(References are to pages.)

- |   |                                     |
|---|-------------------------------------|
| U. S. v. Congress Construction Co., 27, 417, 418. | U. S. v. Lantry, 310.               |
| U. S. v. Connell, Etc., Co., 367.                 | U. S. v. La Vengeance, 371.         |
| U. S. v. Cook, 324.                               | U. S. v. Lee, 7.                    |
| U. S. v. Coombs, 303.                             | U. S. v. Louis, 347.                |
| U. S. v. Copper Queen Co., 457.                   | U. S. v. L. & N. Ry. Co., 317, 322. |
| U. S. v. Cornell Steamboat Co., 373.              | U. S. v. Louisville Canal Co., 295. |
| U. S. v. Crain, 318.                              | U. S. v. Lumber Company, 484.       |
| U. S. v. Cruikshank, 305, 314.                    | U. S. v. Lynch, 509.                |
| U. S. v. Daniel, 445.                             | U. S. v. McInerney, 343.            |
| U. S. v. Dawson, 312.                             | U. S. v. McKnight, 344.             |
| U. S. v. Devlin, 346.                             | U. S. v. McMillan, 21.              |
| U. S. v. Dolan, 322.                              | U. S. v. Malloy, 324.               |
| U. S. v. Eagan, 306, 320.                         | U. S. v. Malone, 343.               |
| U. S. v. Eastman, 319. •                          | U. S. v. Marchant, 325.             |
| U. S. v. Eaton, 300.                              | U. S. v. Marrin, 344.               |
| U. S. v. Eliason, 455.                            | U. S. v. Martin, 308.               |
| U. S. v. Evans, 4, 359.                           | U. S. v. Martindale, 317.           |
| U. S. v. Farrington, 308.                         | U. S. v. Mason, 432.                |
| U. S. v. Fero, 317, 318.                          | U. S. v. Maxey, 344.                |
| U. S. v. Ferreira, 4.                             | U. S. v. Maxwell, 330.              |
| U. S. v. Ferry, 354.                              | U. S. v. Mayer, 342, 343.           |
| U. S. v. Fitzpatrick, 315.                        | U. S. v. Merchants, Etc., Co., 328. |
| U. S. v. Fox, 300.                                | U. S. v. Mitchell, 306, 320.        |
| U. S. v. Frank Sylvia, 371.                       | U. S. v. The Mollie, 399.           |
| U. S. v. French, 323.                             | U. S. v. Moorehead, 293.            |
| U. S. v. Frerichs, 445, 446.                      | U. S. v. Morgan, 316.               |
| U. S. v. Fulhart, 306.                            | U. S. v. Newark, 303.               |
| U. S. v. Gale, 321, 324.                          | U. S. v. Nixon, 432.                |
| U. S. v. Gomez, 480.                              | U. S. v. Noelke, 338.               |
| U. S. v. Goodwin, 454.                            | U. S. v. Nunnemacher, 317, 318.     |
| U. S. v. Greene, 322, 328, 329.                   | U. S. v. Nye, 305.                  |
| U. S. v. Gwynne, 332.                             | U. S. v. Old Settlers, 241.         |
| U. S. v. Hall, 299.                               | U. S. v. Palite, 316.               |
| U. S. v. Hammond, 330.                            | U. S. v. Patten, 300.               |
| U. S. v. Hansee, 318.                             | U. S. v. Patty, 317, 322.           |
| U. S. v. Harden, 308.                             | U. S. v. Payne, 116, 118.           |
| U. S. v. Harmon, 322.                             | U. S. v. Pena, 474.                 |
| U. S. v. Heinze, 322.                             | U. S. v. Peterson, 317.             |
| U. S. v. Horton, 308.                             | U. S. v. Peuschel, 314, 328.        |
| U. S. v. Howard, 316.                             | U. S. v. Phillips, 480, 481.        |
| U. S. v. Howland, 207.                            | U. S. v. Pointer, 319.              |
| U. S. v. Hudson, 1, 19, 300, 346.                 | U. S. v. Praeger, 327.              |
| U. S. v. Hughes, 332.                             | U. S. v. Pridgeon, 344.             |
| U. S. v. Indian Grave District, 475.              | U. S. v. Puleston, 308.             |
| U. S. v. Insley, 330.                             | U. S. v. Ramsey, 182.               |
| U. S. v. Jackalow, 341.                           | U. S. v. Rice, 346.                 |
| U. S. v. Jahn, 419, 420, 421.                     | U. S. v. Richardson, 321.           |
| U. S. v. Jones, 458.                              | U. S. v. Rindskopf, 456.            |
| U. S. v. Kelly, 459.                              | U. S. v. Rodgers, 303, 342.         |
| U. S. v. Kerr, 308.                               | U. S. v. Rosenthal, 322.            |
| U. S. v. Kilpatrick, 322, 323, 344.               | U. S. v. Rundlett, 308.             |
|   | U. S. v. Sally, 371.                |

# TABLE OF CASES

(References are to pages.)

U. S. v. Sanges, 431.  
 U. S. v. Sauer, 308.  
 U. S. v. Sayword, 418.  
 U. S. v. Schollenberger, 42, 45, 46.  
 U. S. v. Scott, 318.  
 U. S. v. Sessions, 145.  
 U. S. v. Shapleigh, 337.  
 U. S. v. Sharp, 317.  
 U. S. v. Simmons, 343.  
 U. S. v. Sims, 330.  
 U. S. v. Smith, 300, 317.  
 U. S. v. Stowell, 313.  
 U. S. v. Taylor, 317, 339, 340, 455, 519.  
 U. S. v. Tenn., Etc., R. R., 474.  
 U. S. v. Thomas, 318.  
 U. S. v. Thompson, 315.  
 U. S. v. Three Friends, 449.  
 U. S. v. Train, 345.  
 U. S. v. Tureaud, 308, 316.  
 U. S. v. Van Duzee, 326.  
 U. S. v. Vigil, 486.  
 U. S. v. Wan Lee, 313, 314, 328.  
 U. S. v. Weeks, 336.  
 U. S. v. Wells, 182, 306, 322.  
 U. S. v. Whitmire, 288.  
 U. S. v. Wilder, 330.  
 U. S. v. Wills, 320.  
 U. S. v. Wilson, 304, 341.  
 U. S. v. Winslow, 317, 432.  
 U. S. v. Woods, 272.  
 U. S. v. Yarborough, 310.  
 U. S. v. Zarafontis, 308.  
 U. S. Bank v. DeVeaux, 67.  
 U. S. Bolt Co. v. Kroncke, 260, 272.

United States, Etc., Ass'n v. Barry, 171.  
 U. S. Fidelity Co. v. Bray, 452.  
 U. S. Fidelity, Etc., Co. v. U. S., 74.  
 U. S. Shipping Co. v. U. S., 365.  
 U. S. Tel. Co. v. Central, Etc., Co., 197.  
 U. S. Trust Co. v. Mercantile, Etc., Co., 284.  
 Upshur County v. Rich, 115, 116, 120.

## V

Vacuum Cleaner Co. v. Valve Co., 271.  
 Vance v. Vandercook Co., 109, 173.  
 Vanderbilt, The, 366.  
 Vanderwater v. Mills, 357, 364.  
 Van Gunden v. Coal & Iron Co., 474.  
 Van Norden v. Morton, 209.  
 Van Stone v. Stillwell, 456, 475.  
 Vaughan v. Sherry, 381.  
 Vaughn, The, v. Telegraph, 378.  
 Venezuela, The, 407.  
 Venner v. Great Northern R. C. Co., 73, 418.  
 Vianello v. Credit Lyonnais, 407.  
 Vicksburg v. Henson, 448.  
 Vicksburg, Etc., Co. v. Putnam, 170, 185.  
 Victor, Etc., v. Sonora Co., 280.  
 Vider v. O'Brien, 475.  
 Virginia v. Felts, 158, 324.  
 Virginia v. Paul, 157.  
 Virginia v. Tennessee, 3.  
 Virginia v. West Virginia, 3.  
 Virginia Commissioners, in re, 464, 466.  
 Virginia Ins. Co. v. Sundberg, 405.  
 Vivar, The, 403.  
 Vogeman v. Raeburn, 409.  
 Von Wagenen v. Sewall, 421.  
 Vosburg Co. v. Watts, 274.  
 Vosburgh, The, 380.  
 Vose v. Roebuck Co., 260.

## W

Wabash R. R. Co. v. Brown, 148.  
 Wabash R. R. Co. v. Daniels, 202.  
 Wabash, Etc., Co. v. Central Trust Co., 135.  
 Wabash Ry. Co. v. Hayes, 505.  
 Wade v. Lawder, 17.  
 Wade v. Travis County, 199.  
 Wadley v. Blount, 229.  
 Wadsworth v. Warren, 454.  
 Waco Hdwe Co. v. Michigan, Etc., Co., 116, 123.

## TABLE OF CASES

(References are to pages.)

- |   |  |
|---|--|
| <p>Waha-Lewiston Land Co. v. Lewiston Land Co., 120.</p> <p>Waite v. Phoenix Ins. Co., 123.</p> <p>Waite v. Sante Cruz, 110.</p> <p>Walden v. Craig, 446.</p> <p>Walden v. Skinner, 31.</p> <p>Waldo v. Wilson, 274.</p> <p>Waldron v. Waldron, 460, 463.</p> <p>Walker v. Collins, 65, 124.</p> <p>Walker v. Houghteling, 476.</p> <p>Walker v. Hughes, 392.</p> <p>Walker v. O'Neill, 127.</p> <p>Walker v. Powers, 56.</p> <p>Walker v. Richards, 129.</p> <p>Wall v. C. R. R. Co., 170.</p> <p>Walla Walla v. Water Company, 223.</p> <p>Wallace v. Adams, 241.</p> <p>Wallace v. Loomis, 295.</p> <p>Wallach v. Rudolph, 109.</p> <p>Walsh, The W. J., 365.</p> <p>Walsh v. U. S., 347.</p> <p>Walter v. Northeastern Ry. Co., 105.</p> <p>Wange v. Public Service Co., 47.</p> <p>Wanner v. Bessinger, 145.</p> <p>Warburton v. White, 198.</p> <p>Ward v. Chamberlain, 407.</p> <p>Ward v. Cochran, 460.</p> <p>Ward v. Ogdensburg, 382.</p> <p>Ward v. Peck, 369.</p> <p>Ward v. Thompson, 373.</p> <p>Ward v. Ward, 293.</p> <p>Warfield v. Chaffe, 514.</p> <p>Waring v. Clarke, 349, 352, 409.</p> <p>Washburn v. Reliance, Etc., Co., 201.</p> <p>Washington v. Fair Child, 507.</p> <p>Washington, The, v. The Gregory, 380.</p> <p>Washington County v. Durant, 465.</p> <p>Washington Market Co. v. Hoffman, 99.</p> <p>Waskey v. Hammer, 523.</p> <p>Waterman, ex parte, 344.</p> <p>Waterman v. Canal Bank, 31.</p> <p>Waterman v. Parker, 265.</p> <p>Waters-Pierce Co. v. Texas, 502, 504, 507.</p> <p>Watkins v. Holman, 25.</p> <p>Watson v. Bonfils, 129.</p> | <p>Watson v. National, Etc., Co., 241.</p> <p>Watt v. Starke, 463.</p> <p>Watts v. Camors, 207.</p> <p>Wayman v. Southard, 4.</p> <p>Webb v. Barnwall, 90.</p> <p>Weber v. Grand Lodge, 420.</p> <p>Weber v. Hertzell, 265.</p> <p>Weber v. Mihilis, 474.</p> <p>Webster v. Cooper, 198.</p> <p>Webster Coal Co. v. Cassatt, 438.</p> <p>Wechsler v. U. S., 344.</p> <p>Wecker v. Enameling Co., 435.</p> <p>Weeks v. U. S., 316.</p> <p>Wehrman v. Conklin, 222.</p> <p>Welch v. Fallon, 381.</p> <p>Wellman v. Morse, 368.</p> <p>Wells v. U. S., 412.</p> <p>Welty, in re, 344.</p> <p>Werner v. Charleston, 450.</p> <p>West v. Aurora, 115.</p> <p>West v. Cabell, 308.</p> <p>West v. Irwin, 482.</p> <p>West v. Louisiana, 329.</p> <p>West v. Smith, 173.</p> <p>West v. Uncle Sam, 387.</p> <p>West Chicago R. R. Co. v. Ellsworth, 489.</p> <p>Western Air Line v. McGillis, 477.</p> <p>Western Dredging Co. v. Heldmaier, 461.</p> <p>Western States, The, 410.</p> <p>Western Union, Etc., Co. v. Andrews, 8.</p> <p>Western Union Co. v. Ann Arbor, Etc., Co., 125.</p> <p>Western Union, Etc., Co. v. Brown, 135.</p> <p>Western Union, Etc., Co. v. Burris, 202.</p> <p>Western, Etc., Co. v. Butte, Etc., Co., 265.</p> <p>Western Union Tel. Co. v. Call, 191.</p> <p>Western Union Co. v. Crovo, 497.</p> <p>Western Union Co. v. Eyser, 478.</p> <p>Western Union, Etc., Co. v. Illinois R. R. Co., 120.</p> <p>Western Union, Etc., Co. v. U. S., Etc., Co., 464.</p> |
|---|--|

# TABLE OF CASES

(References are to pages.)

- Westinghouse, Etc., Co. v. Electric Co., 176.  
 Westinghouse v. Publishing Co., 47.  
 Weston v. Charleston, 115.  
 Wetmore v. Rymer, 62, 108, 418.  
 Whalen v. Sheridan, 461.  
 Wheeling, Etc., Bridge Co. v. Bridge Co., 449, 495.  
 Whelan v. Enterprise Co., 85.  
 Whelan v. N. Y., Etc., R. Co., 151.  
 Whistler, The, 402, 403, 404.  
 Whitcomb v. Smithson, 143, 146.  
 White v. Ewing, 85, 92.  
 White v. The Cynthia, 402.  
 White v. Wansey, 464.  
 Whitehead v. Shattuck, 209, 222.  
 Wiborg v. U. S., 322, 339, 340.  
 Wightman v. Persons, 126.  
 Wildenfels, The, 409.  
 Wiley v. Sinkler, 109.  
 Wilkes County v. Coler, 198.  
 Wilkes v. Dinsman, 456.  
 Willard v. Dorr, 364.  
 William Marshall, The, 369.  
 Williams v. Adler, 272.  
 Williams v. Bankhead, 245.  
 Williams v. Bruffy, 497.  
 Williams v. Byrne, 88.  
 Williams v. Crabb, 117.  
 Williams v. Hagood, 4.  
 Williams v. Ins. Co., 373.  
 Williams v. Kinsey, 271.  
 Williams v. Morgan, 472.  
 Williams v. Neely, 228.  
 Williams v. Nottawa, 62.  
 Williams v. Ople, 273.  
 Williams v. Suffolk Ins. Co., 3.  
 Williams v. U. S., 319, 320, 340, 344.  
 Williamson v. Krohn, 72.  
 Williamson v. U. S., 339, 432, 457.  
 Willoughby v. Chicago, 504.  
 Wills v. Russell, 177, 178, 338.  
 Wilmington v. Ricaud, 464, 465.  
 Wilson, ex parte, 311, 316.  
 Wilson v. North Carolina, 505.  
 Wilson v. Oswego Township, 126, 128, 131.  
 Wilson v. Riddle, 463.  
 Wilson v. Seligman, 23.  
 Wilson v. The Ohio, 364.  
 Wilson v. U. S., 314, 326, 333, 334, 340.  
 Wilson Packing Co. v. Hunter, 42.  
 Window Glass Co. v. Brookville, 278.  
 Windsor v. McVeigh, 327.  
 Winn v. Wabash R. R. Co., 72.  
 Winter v. Koon, 33.  
 Winters v. Ethell, 444.  
 Winthrop v. Meeker, 436, 446.  
 Wirgman v. Persons, 420.  
 Wiscart v. Dauchy, 454.  
 Wisconsin v. Frear, 506.  
 Wisconsin v. Pelican Ins. Co., 118, 119.  
 Wisner, ex parte, 120, 124.  
 Wiswall v. Sampson, 85.  
 Withaup v. U. S., 333.  
 Wethenbury v. U. S., 438.  
 Wolcott v. National, Etc., Co., 278.  
 Wolcott v. Watson, 116.  
 Woldson v. Larson, 202.  
 Wolfson v. U. S., 321, 322.  
 Wong Sang v. U. S., 489.  
 Wong Wing v. U. S., 311.  
 Wood v. Chesebrough, 507.  
 Wood v. Davis, 31, 78, 126.  
 Wood v. U. S., 338.  
 Woodruff v. One Covered Scow, 359.  
 Woods v. Lindvall, 460.  
 Woodside v. Beckham, 110, 239.  
 Woodside v. Ciceroni, 107.  
 Wooldridge v. McKenna, 34.  
 Woolston v. The Warner, 365.  
 Wooster v. Handy, 288.  
 Workman v. Mayor, 26.  
 World's Columbian Exposition v. U. S., 424.  
 Wormley v. Wormley, 31, 78.  
 Worthington, The, 366.  
 Wrecking Co. v. Phoenix Ins. Co., 380.  
 Wright v. Barnard, 268, 274.  
 Wyandotte, The, 413.



## TABLE OF CASES

(References are to pages.)

Wynne v. United States, 303.  
Wyss-Thalman v. Maryland Casualty Co., 459.

### Y

Yarde v. B. & O. R. Co., 122.  
Yarnell v. Felton, 129.  
Yazoo, Etc., Ry. Co. v. Adams, 198, 499.  
Yeaton v. Lennox, 242.  
Yellow Poplar, Etc., Co. v. Chapman, 460.

York, Etc., Co. v. Myers, 182.  
Young, ex parte, 6, 7, 225, 227.  
Young v. Bryan, 56.  
Young v. Ewart, 55, 151, 154.  
Young Mechanic, The, 385.  
Young v. Martin, 457.

### Z

Zeller's Lessee v. Eckert, 456.  
Zenith Co. v. Stromberg Co., 260.  
Zenobia, The, 365, 381.  
Zimmerman v. Sorelle, 226, 228.  
Zych v. American Car Co., 176.

# INDEX.

---

(References are to pages.)

## **ACTION,**

meaning of term, 115.  
of local nature, 33.

## **ADEQUATE REMEDY AT LAW,**

what deemed, 222.  
as of what date, 222.  
see Procedure in Equity.

## **ADMINISTRATIVE FUNCTIONS,**

outside judicial power, 4.

## **ADMINISTRATORS,**

stand on own citizenship, 74.  
as plaintiffs in equity, 239.

## **ADMIRALTY JURISDICTION,**

affreightment, contracts of 364.  
bottomry and respondentia  
loans, 365.  
building, contracts for, 362.  
changes, power to make in the  
law, 353-355.  
charter-parties, 364.  
common-law remedy, saving,  
12.  
common-law remedy, what is,  
13.  
consortship, 366.  
constitutional grant, 4.  
content of jurisdiction, 352,  
357.  
contracts enumerated, 362.  
crimes, jurisdiction over, 303.

## **ADMIRALTY JURISDICTION—**

Cont.

death, actions for, 360.  
demurrage, 368.  
exclusive, how far, 12, 349.  
general average, 367.  
history, early, 348.  
insurance, marine, 364.  
lien, nature of maritime, 356.  
limitation of liability, 371.  
locality, test in tort, 358.  
locality, tidal test, 358.  
locality, what is land, 359.  
maritime, contract must be,  
348.  
maritime, must tort be, 360.  
materials and supplies, 363.  
materials and supplies, home  
ports, 363.  
passengers, 365.  
petitory actions, 369.  
pilotage, 365.  
possessory actions, 369.  
prize, 348.  
quasi-contracts, 362.  
ransom, 366.  
reasons, for vesting, 10.  
salvage, 366.  
seamen, who are, 363.  
seamen, contracts of, 363.  
seizures, 370.  
state, legislative power of, 355.  
stevedorage, 366.  
surveys, 371.  
tolls, 366.

## INDEX.

(References are to pages.)

### ADMIRALTY JURISDICTION—

Cont.

torts, locality is test, 358.  
towage, 365.  
transportation of persons, 365.  
wharfage, 366.

### ADMIRALTY RULES,

see Procedure in Admiralty.

### ADVERTISEMENTS,

see Publication.

### ADVISORY OPINIONS,

outside judicial power, 4.

### AFFIDAVITS,

experts, in patent, etc., cases,  
281.  
as to amount in controversy,  
108.

### AFFREIGHTMENT, CON- TRACTS OF,

see Admiralty Jurisdiction.

### AGENTS,

process on, of individuals, 40.  
process on, of corporations,  
45.  
federal, do not make federal  
suits, 63.

### ALIENS,

actions between, 81.  
actions between, and citizens,  
81, 127.  
definition of, 82.  
domiciled in state, no removal  
by, 127.  
domiciled in state, no U. S. cit-  
izenship, 65.  
local prejudice, bar removal  
for, 154.

### ALIENS—Cont.

officers, suits by, against, re-  
movable, 159.  
separable controversy, cannot  
remove, 130.  
venue of actions against, 26.

### ALLOWANCE,

see Appellate Procedure.

### AMBASSADORS,

constitutional grant, 4.  
exclusive jurisdiction over, 12.  
reason for jurisdiction, 10.  
supreme court, jurisdiction of,  
19.

### AMENDMENTS,

at law, 186.  
defective allegation of citizen-  
ship, 80.  
removable, causes made, by,  
122.  
see Procedure in Admiralty;  
Procedure in Equity; Crim-  
inal Law.

### AMOUNT IN CONTROVERSY,

admiralty, several plaintiffs,  
98.  
affidavit to show, 108.  
aggregating counts or claims,  
110.  
appeal and error, now imma-  
terial, 428.  
appear, made to, how, 108.  
assignment for collection, 110.  
cancellation of charge, 106.  
change of, pending suit, 123.  
child, custody of, 108.  
classification of jurisdiction  
by, 49.  
counterclaims in removal, 123.

## INDEX.

(References are to pages.)

### AMOUNT IN CONTROVERSY

—Cont.

county-seat, loss of, 108.  
creditors' bills, 100.  
direct involution necessary,  
109.  
dismissal for want of, 62.  
divorce, 108.  
equity, suits in, 95, 106.  
fictitious claims, 109.  
freight, removal of suit for  
damage to, 121.  
general limitations, 93.  
immaterial, when, 49.  
inestimable things, 108.  
joint or several claims, 94, 96.  
law, suits at, 93, 95.  
liberty, suits to recover, 108.  
office, to recover, 108.  
property-right, to protect, 106.  
quiet title, 107.  
removal proceedings, 121.  
removal proceedings, as of  
what time, 121.  
removal proceedings, how  
shown, 121.  
removal proceedings, reducing  
to defeat, 123.  
replevin, 95.  
specific performance, 107.

### ANCILLARY PROCEEDINGS,

classification, 83.  
constructive service under, 88.  
dependent upon main suit, 82.  
examples at law, 89.  
examples in equity, 90.  
nature of, 82.  
possession, actual or potential,  
83.  
property, remedies to recover,  
86.

### ANCILLARY PROCEEDINGS—

Cont.

receivers, suits by, 85.  
receivers, suits against, 92.  
records and process, 87.  
venue, not governed by gen-  
eral, 27.

### APPEAL AND ERROR,

see also Appellate Procedure.  
admiralty cases, 411.  
amount immaterial, 428.  
anti-trust cases, 430.  
C. C. A., jurisdiction of, 415.  
C. C. A., when final, 429.  
C. C. A., certiorari to, 416, 430.  
commerce cases, 430.  
constitutional questions, con-  
trolling, 424.  
constitutional questions, cross-  
appeal, 428.  
constitutional questions, estop-  
pel, 426.  
constitutional questions, to be  
real, 426.  
constitutional questions,  
raised how, 427.  
constitutional questions, va-  
rious postures, 423.  
courts, to what, 414, 428.  
criminal cases, 431.  
decisions reviewable, see Fin-  
ality.  
distinction between appeal and  
error, 433.  
district courts, appeals to, 48.  
double, not intended, 419.  
final judgments, 419, 434.  
finality, appellate judgment,  
449.  
finality, concept of, 434.  
finality, conception below, 448.

## INDEX.

(References are to pages.)

### APPEAL AND ERROR—Cont.

finality, conditional decree,  
449.  
finality, cross-bill, dismissal of,  
444.  
finality, doctrine of state court,  
448.  
finality, judicial v. ministerial,  
446.  
finality, receiver, appointment of, 445.  
finality, remanding removed  
cause, 444.  
injunctions, effect on, 297.  
interlocutory orders, 451, 452.  
jurisdictional question, to  
which court, 419.  
jurisdictional question, exam-  
ples, 417.  
jurisdictional question, certifi-  
cate, 421.  
receivers, temporary, 451.  
remand, order of, 153, 146.  
Supreme Court, jurisdiction  
on, 414.  
Supreme Court, over C. C. A.,  
416.

### APPEARANCE,

general, waiver of process, 23.  
general, waiver of citation, 480.  
general, waiver of immunity, 5.  
general, what is, in equity, 264.  
general, removal is not, 148.  
general, state making special,  
amount to, 171.

### APPELLATE PROCEDURE,

allowance of appeal, 465.  
allowance of error, 466, 513.  
appeal, is continuance of suit,  
466.  
assignments of error, 473.

### APPELLATE PROCEDURE— Cont.

assignments of error, definite-  
ness, 474.  
assignment of error, failure to  
file, 473.  
assignments of error, separate,  
to be, 475.  
bill of exceptions, 454.  
bill of exceptions, term bills,  
461.  
bill of exceptions, time to file,  
458, 463.  
bill of exceptions, in equity,  
463.  
bond, necessity for, 476.  
"brought," meaning of, 485.  
citation, 479, 483.  
criminal cases, error in, 345.  
docketing, 489.  
"entry," meaning of, 486.  
error, scope of writ, 453.  
error, is continuance of suit,  
466.  
error, issuance and service,  
484.  
error, writ of right, 466.  
limitation, statutes of, 484, 489.  
nunc pro tunc allowance, 466.  
parties, who may appeal, 470.  
petition for appeal or error,  
464.  
record, old and new methods,  
490.  
record, printing, 490.  
reversal, prayer for, 473.  
"sued out," meaning of, 485.  
summons and severance, 467.  
supersedeas, criminal cases,  
345.  
supersedeas, general method,  
477.

## INDEX.

(References are to pages.)

### APPELLATE PROCEDURE—

Cont.

“taken,” meaning of, 486.  
transcript, filing, 489.  
transcript, making up, 487.  
transcript, old and new, 490.  
see Criminal Law; Procedure  
in Equity; Procedure in Ad-  
miralty.

### ARBITRATION,

right to submit to, 182.  
waiver of jury amounting to,  
179.

### “ARISE,”

when suits, under patent laws,  
15.  
when suits, under constitution,  
etc., 64, 63, 57, 124.

### ARREST,

see Criminal Law; Procedure  
in Admiralty; Procedure at  
Law.

### ASSIGNEE,

of debentures, 51.  
of chose in action, who is, 56.  
of chose in action, may sue, 54.  
of chose in action, pleading  
and proof, 57.

### ASSIGNMENT,

chose in action, 54.  
for collection, no aggregating,  
110.  
fraudulent, disregarded, 75.  
real, motive immaterial, 75.

### ASSIGNMENT OF ERRORS,

see Appellate Procedure.

### ATTACHMENTS,

conform to state laws, 187.

### ATTACHMENTS—Cont.

effect of removal, 147.  
foreign, 35.  
see Procedure in Admiralty;  
Procedure at Law.

### AUDITORS,

power to appoint at law, 182.

### AUTHORITY,

see Review of State Courts.

### AUXILIARY,

see Ancillary Proceedings.

### BAIL,

see Criminal Law; Procedure  
in Admiralty.

### BANKRUPTCY,

exclusive jurisdiction in, 12.  
general orders in, 168.  
state jurisdiction in, 17.

### BANKS,

see National Banks.

### “BETWEEN,”

diverse citizens, 65, 81.

### BILL OF DISCOVERY,

see Procedure in Equity.

### BILL OF PARTICULARS,

See Criminal Law.

### BILL OF REVIEW,

see Procedure in Equity.

### BONDS,

injunctive orders, 296.  
public work, venue, 27.  
public work, U. S. real party,  
74.  
see Procedure in Admiralty.

## INDEX.

(References are to pages.)

### BONDS—Cont.

see Appellate Practice;  
Removal of Causes.

### BUSINESS,

see Doing Business; Corporations.

### CAPITAL CRIMES,

appeal to Supreme Court, 432.  
venue of, 312.

### CASE,

constitutional enumeration, 4.  
includes both sides, 15, 58.  
jurisdiction embraces whole,  
10.  
meaning of word, 9.

### CAUSE,

meaning of term, 115.

### CERTAIN,

motion to make, 273.

### CERTIFICATION, 416.

### CERTIORARI, 416, 430.

### CHALLENGES,

see Procedure at Law; Criminal Law.

### CHARGE TO JURY,

see Procedure at Law; Criminal Law.

### CHOSE IN ACTION,

assignees, suits by, 54.  
pleading and proof of capacity,  
55.  
what is, 55.

### CIRCUIT COURTS,

abolished by Judicial Code, 21.

### CIRCUIT COURTS OF

#### APPEALS.

Appellate jurisdiction, 415.

### CITATION,

see Appellate Procedure; Review of State Courts.

### CITIZENSHIP,

administrator, stands on own,  
74.

aliens, who are, 82.

aliens, suits between, 81.

aliens and citizens, suits between, 81.

amending allegations of, 80.

assignees, suits by, 65.

"between," meaning of, 65.

boards of trustees, have no,  
73.

change of, 75, 79.

complete diversity required,  
77.

corporations, 67.

corporations, consolidated or domesticated, 68.

corporations, receivers of, 75.

defined by 14th Amendment,  
65.

dismissal, for want of, 62.

diversity, must be complete,  
77.

diversity, how shown, 80.

executors, stand on own, 74.

false, averments on removal,  
129.

federal questions make, immaterial, 125.

fraudulent change of residence, 75.

fraudulent transfers, 75.

guardian, when stands on own,  
75.

immaterial in federal question,  
125.

## INDEX.

(References are to pages.)

### CITIZENSHIP—Cont.

initial diversity required, 79.  
joint-stock companies, 73.  
municipal corporations, 67.  
partnership, has no, 73.  
real and nominal parties, 73.  
realignment of parties, 77.  
reason for vesting jurisdiction, 10.  
receiver, when stands on own, 75.  
removal of causes, false averment, 129.  
removal of causes, citizenship in, 113, 122, 126.  
residence, averment of, not enough, 66.  
residence, in sense of domicile, 65.  
shown by any part of record, 80.  
state or federal, may be, 65.  
state or subdivision thereof, 66, 67, 126.  
stockholders' suit, 73.  
substitution of parties, 79.  
territory, citizen of, 65.  
trustee, when stands on own, 75.  
venue, in diversity, 25.

### CIVIL,

"controversies" imply, suits, 9.  
habeas corpus is, 118.  
or penal, how determined, 118.  
removal, generally requires suit to be, 118.

### CIVIL RIGHTS,

removal to protect, 155; see Criminal Law.

### CLAIMANT,

see Procedure in Admiralty.

### CLAIMS, COURT OF,

establishment of, 20.

### CLAIMS UNDER DIFFERENT STATES,

original jurisdiction, 53.  
removal of causes for, 159.

### CLASS-SUITS,

see Procedure in Equity,

### CLOUD ON TITLE,

amount in controversy, 107.  
publication act, 33.

### CODE, CRIMINAL,

see Criminal Law.

### CODE, JUDICIAL, 21.

### COLLATERAL ATTACK,

federal judgment, not open to, 20.

### COMITY,

potential custody, 85.  
state and federal courts, 225.

### COMMITMENT,

see Criminal Law.

### COMMON LAW,

no federal, 191.  
remedy, meaning of, 13.

### CONFORMITY ACT,

see Procedure at Law.

### CONGRESS,

duty to organize judiciary, 19.



## INDEX.

(References are to pages.)

### CONGRESS—Cont.

removal of suits against officers, 113, 158.

### CONSENT,

jurisdiction over subject-matter, 62.

jurisdiction over person, 23, 264.

see Jurisdiction.

### CONSOLIDATION OF CAUSES,

see Criminal Law; Procedure in Admiralty.

### CONSTITUTION,

"cases," meaning of, 9.

cases, what arise under, 57.

"controversies," meaning of, 9.

division of powers, 4.

eleventh amendment, 5.

fourteenth, "extend," meaning of, 8.

grant of judicial power, 1, 4.

question under, to be real, 60.

reason for national judiciary, 9.

### CONSTRUCTION OF STATUTES,

see Interpretation.

### CONSULS,

exclusive jurisdiction over, 12.

Supreme Court, jurisdiction over, 19.

### CONTROVERSIES,

enumeration of jurisdiction, 4.

meaning of term, 9.

see Removal of Causes.

### COPYRIGHT LAWS,

arise under, what cases, 15.

exclusive jurisdiction, 12.

### COPYRIGHT LAWS—Cont.

rules of Supreme Court, 168.

venue, of suits, 26.

### CORPORATIONS,

citizenship of, 67.

consolidated, 68.

doing business, what is, 41, 42.

domesticated, 68.

federal, judicial notice of, 125.

federal, as joint defendants, 125.

federal, make federal question, 63.

federal, railroad corporations, 63.

foreign, service on, 41.

fraudulent organization, 76.

municipal, 67.

national banks, not treated as federal, 63.

national banks, no injunction or attachment against, 63.

process, service on, 40, 41, 45, 46.

removal, right of state to prohibit, 160.

stockholders' suits, 73.

stockholders' suits, see also Procedure in Equity.

### COUNTERCLAIMS,

amount in removal, 123.

in equity, see Procedure in Equity.

not suits for removal, 115.

### COUNTY,

citizenship of, 67.

### COURTS, FEDERAL,

ancillary jurisdiction, 82, 83.

circuit, abolished, 21.

Circuit Courts of Appeals.

## INDEX.

(References are to pages.)

### COURTS, FEDERAL—Cont.

Claims, Court of, 20.  
collateral attack on judgments, 20.  
comity, and rule of priority, 83, 225.  
Congress, must organize, 19.  
consent, can confer no jurisdiction, 62.  
Customs Appeals, Court of, 20.  
district, appellate jurisdiction, 48.  
district, catalogue of jurisdiction, 48.  
district, power limited to district, 25, 37, 38, 33.  
enumeration of, 20.  
executive powers, have no, 4.  
executions of district, 38.  
injunctions to state courts, 225.  
jurisdiction, two classes, 12.  
jurisdiction, exclusive when, 11.  
jurisdiction, statutory, 20.  
jurisdiction, by removal.  
limited, not inferior, 20.  
limited to sovereignty of U. S., 23.  
necessity for national, 9.  
officers of, may remove suits, 112, 158.  
rules, power to enact, 165.  
Supreme Court, 18, 19, 414.  
territorial, 21.

### CRIMES,

see Criminal Law.

### CRIMINAL LAW,

admiralty jurisdiction, 303.  
appellate jurisdiction, 431.  
argument of counsel, 339.

### CRIMINAL LAW—Cont.

arraignment, 324.  
arrest of judgment, 343.  
arrest, without warrant, 306.  
arrest, with warrant, 307.  
bail, 308, 346.  
bill of particulars, 315.  
charge, 340.  
Circuit Court of Appeals, 431.  
code, criminal, 304.  
common-law, crimes, 300.  
common-law, procedure, 305.  
constitutional grant, 299.  
continuances, 325.  
counsel, assignment of, 325.  
counts, joinder of, 317, 318.  
depositions, 330.  
demurrer, 324.  
duplicity, 317, 322.  
error, writ of by U. S., 431.  
error, writ of by, 345.  
evidence, objections to, 337.  
evidence, order of, 338.  
evidence, rules of, 330.  
exceptions to charge, 340.  
exclusive jurisdiction in, 11.  
form, defects of, 315.  
forts and public buildings, 302.  
grand jury, make-up and powers, 312.  
grand jury, objections to, 320, 321.  
Guano Islands, crimes on, 302.  
high seas, meaning of, 302.  
indictment, charging the offense, 314.  
indictment, consolidating, 318.  
indictment, furnishing copy, 326.  
infamous crimes, 310.  
information, nature and method, 316.

## INDEX.

(References are to pages.)

### CRIMINAL LAW—Cont.

jury, challenges, 328, 329.  
jury, composition of, 327.  
jury, list of, when, 326.  
jury, when may be waived,  
327.  
misjoinder, 322.  
new trial, 342.  
perjury, indictment for, 315.  
plea, necessity of, 324.  
power, to punish crime, 299.  
preliminary examination, 308.  
presentment, 310.  
quash, sustaining motion discretionary, 323.  
removal from state court, 157.  
removal to another district,  
309.  
searches and seizures, 336.  
self-crimination, 333, 334.  
sentence, 344.  
severance, 325.  
state laws, affecting procedure,  
305.  
state and nation, relative  
powers, 300.  
state and nation, same offense,  
305.  
supersedeas, 345.  
territorial offenses, 302.  
venue of trials, 311.  
verdicts, general and special,  
341.  
verdicts, motion to direct, 339.  
witnesses, confrontation, 329.  
witnesses, cross-examination,  
338.  
witnesses, leading questions,  
338.  
witnesses, list of, 326.  
witnesses, process for, 38.

### CROSS-BILL,

see Procedure in Equity.

### CROSS-DEMAND,

whether suit for removal, 115.

### CROSS-EXAMINATION,

see Procedure at Law; Criminal Law.

### CROSS-LIBEL,

see Procedure in Admiralty.

### CUSTODY,

of child, value, see Amount in Controversy; of property, see Ancillary Proceedings.

### CUSTOMS APPEALS,

Court of, see Courts, Federal.

### DEATH, ACTIONS FOR,

see Admiralty Jurisdiction.

### DEBT,

imprisonment for, see Procedure in Admiralty.

### DECREE,

see Procedure in Equity; Procedure in Admiralty; Appeal and Error.

### DECREE PRO CONFESSO,

see Procedure in Equity; Procedure in Admiralty.

### DEDIMUS,

see Depositions.

### DEFAULT,

of party in removal, 133.

## INDEX.

(References are to pages.)

### DEFAULT—Cont.

see Procedure in Equity; Procedure in Admiralty; Removal of Causes.

### DEFENDANTS,

used collectively, for venue, 29.  
see Parties; Procedure at Law; Procedure in Equity; Procedure in Admiralty.

### DEPOSITIONS,

de bene esse, 175.  
dedimus, under a, 176.  
equity, in, 179.  
examiner to take, in equity, 281.  
in perpetuam, 176.  
plaintiff's, taking before trial, 176.  
state laws as to taking, 176.  
time of taking in equity, 279.  
see Procedure at Law; Procedure in Equity; Procedure in Admiralty.

### DISCOVERY,

see Procedure in Equity.

### DISMISSAL,

want of diversity, federal question or amount, 62.  
without prejudice, final decree, 435.

### DISPENSABLE,

see Parties.

### DISQUALIFICATION,

of judge, 37.

### DISTRICT COURTS,

see Courts, Federal.

### DISTRICTS,

division of country into, 23.  
divisions, of, 22, 36.  
divisions, transfer between, 36, 37.  
limit of court's power, 25, 37.  
property in two, 36.  
venue, where two or more districts, 25.

### DIVERSE CITIZENSHIP,

see Citizenship.

### DIVORCE,

no amount in controversy, 108.

### DOCUMENTS, PRODUCTION OF,

see Procedure at Law; Procedure in Equity.

### DOING BUSINESS,

what amounts to, 42.

### DOMICILE,

bona fide and fraudulent changes of, 75.  
residence means, when, 66.

### EMPLOYERS' LIABILITY,

no removal in, 126.  
venue of suits, 27.

### ENFORCEMENT OF LIENS,

see Publication.

### EQUITABLE DEFENSES,

now possible at law, 172.

## INDEX.

(References are to pages.)

### EQUITY-DOCKET,

see Procedure in Equity.

### EQUITY, JURISDICTION,

acts in personam, 24.

adequate remedy at law, 222.

adequate remedy, defense of,  
practically gone, 274.

admiralty has not full, powers,  
373.

analysis of cases, 219.

distinction between, and law,  
205, 207.

distinction between substan-  
tive and procedural equity,  
210.

effect of distinction between,  
and law, 209.

follows the law, 215.

no federal, as no federal com-  
mon law, 221.

injunctions against I. C. C.  
orders, 233.

injunctions in labor cases, 233.

injunctions, staying suits in  
state courts, 223.

injunctions to restrain execu-  
tion of state statutes, 231.

local and general jurispru-  
dence, 216.

statutory extensions, of, 214.

uniform, is not, as to sub-  
stance, 206.

see Procedure in equity.

### EQUITY RULES,

see Procedure in Equity;  
Rules of Court.

### ERROR, WRIT OF,

see Appellate Procedure; An-  
peal and Error.

### ERRORS, ASSIGNMENT OF,

see Appellate Procedure.

### EVIDENCE,

in suits at law:

see Procedure at Law; see  
also Criminal Law.

### EXAMINERS,

see Procedure in Equity.

### EXCEPTIONS,

see Procedure in Equity; Ap-  
pellate Procedure; Proced-  
ure in Admiralty; Procedure  
at Law.

### EXECUTION,

conforms to state laws, 187.

in equity to collect money  
judgment, 290.

runs, where, 38.

stay of, at law, 188.

stay, automatic, on appeal or  
error, 477.

### EXECUTIVE,

functions not judicial power, 4.

### EXECUTORS,

stand on own citizenship, 74.

as parties in equity, 239.

### EXPERT WITNESSES,

in patent, etc., cases, 281.

### "EXTEND,"

meaning of, 8.

### FEDERAL QUESTION,

agent, federal, does not im-  
port, 63.

## INDEX.

(References are to pages.)

- FEDERAL QUESTION—Cont.**  
as ground of jurisdiction, 57.  
citizenship immaterial, 125.  
corporation, federal imports, 63.  
dismissal because unsubstantial, 62.  
exists as to joint defendant, with federal corporation defendant, 125.  
national banks, as parties, do not import, 63.  
officer, federal, sued as such, imports, 64.  
railroads, chartered by Congress, do not import, 63.  
real, required, 62, 125.  
receivers of federal corporation import, 64.  
removal on ground of, 112.  
venue, in, 25.  
see Appeal and Error; Appellate Jurisdiction; Review of State Courts.
- FORFEITURES AND PENALTIES,**  
exclusive jurisdiction, 11.  
see Procedure in Admiralty; Courts; Jurisdiction.
- FORMAL,**  
see Parties; Citizenship; Procedure in Equity; Removal of Causes.
- FRAUDULENT JOINDER,**  
see Removal of Causes.
- FRAUDULENT REMOVALS,**  
see Citizenship.
- FRAUDULENT TRANSFERS,**  
see Citizenship.
- GENERAL AVERAGE,**  
see Admiralty Jurisdiction.
- GENERAL JURISPRUDENCE,**  
see Rule of Decision; Equity Jurisprudence.
- GRAND JURY,**  
see Criminal Law.
- GRANTS,**  
of lands under different states, 113, 53.
- GUARDIANS,**  
when stand on own citizenship, 75.  
as plaintiffs in equity, 239.
- HABEAS CORPUS,**  
is civil suit, 118.  
to test removal for trial, 310.
- HIGHEST COURT,**  
see Review of State Courts.
- IMMUNITY,**  
of state from suit, 5.
- INDICTMENT,**  
see Criminal Law.
- INDISPENSABLE,**  
see Parties; Procedure in Equity.
- INFAMOUS CRIMES,**  
see Criminal Law.

## INDEX.

(References are to pages.)

### INFERIOR,

federal courts are not, 20.

### INFORMATION,

see Criminal Law; Procedure  
in Admiralty.

### INFRINGEMENT CASES,

exclusive jurisdiction, 12, 15;  
venue, 26.

### INHABITANT,

meaning of term, 29.

### INJUNCTIONS,

appeal, effect of, 297.  
bond for restraining orders  
and preliminary injunctions,  
295.  
notice of application, 295.  
prohibitions in labor cases, 233.  
proceedings in state courts,  
223.  
restraining execution of state  
statutes, 232.  
restraining I. C. C. orders, 233.  
what judges may grant, 294.  
see National Banks.

### IN PERPETUAM,

see Depositions, 176.

### INSTRUCTIONS,

see Procedure at Law; Appel-  
late Procedure.

### INSURANCE,

general jurisprudence, 201.  
marine, of admiralty cogni-  
zance, 364.

### INTEREST,

when state has a real, 126.

### INTEREST—Cont.

real party in interest, see Pro-  
cedure in Equity; Proced-  
ure in Admiralty; Appeal  
and Error.

### INTERPRETATION,

constitution and federal laws,  
federal, binding on state  
courts, 192.  
state statutes, how far federal  
courts follow state courts,  
197.  
state statutes, when meaning  
established, 200.

### INTERROGATORIES,

see Procedure in Equity; Pro-  
cedure in Admiralty.

### INTERSTATE COMMERCE COMMISSION,

suits to enjoin, 233.  
venue of actions, 27.

### INTERVENTION,

admiralty, in, see Procedure in  
Admiralty.  
equity, in, see Procedure in  
Equity.  
nature of, in equity, 251.  
parties by, cannot remove  
cause, when, 128.  
suit, for removal, 116.

### JOINDER,

of parties, voluntary, makes  
them joint parties, 78.  
of actions or parties, see Pro-  
cedure at Law; Procedure in  
Equity; Procedure in Ad-  
miralty; Appellate Practice.

## INDEX.

(References are to pages.)

### JUDGE,

conformity act does not completely bind, 170.  
disqualification of, 37.

### JUDGMENTS,

collateral attack on, 20.  
distinguished from process of execution, 436.  
final, only, reviewable, 419.  
final, what are, 434.  
lien of federal, 38.  
motions in arrest (criminal), 343.  
suits to enforce federal, 38.  
see Appeal and Error.

### JUDICIAL CODE,

adoption of, 21.  
mere compilation, 21.

### JUDICIAL NOTICE,

of federal charter, 125.

### JUDICIAL POWER,

constitutional grant, 1.  
definition, 2.  
extends to what, 4.  
excludes administrative functions, 4.  
excludes legislative functions, 4.  
excludes moot opinions, 4.  
excludes political questions, 2.  
limited to territorial sovereignty, 23.  
whole case embraced, 10.

### JUDICIARY,

Congress must organize, 19.  
necessity for national, 9.

### JURISDICTION,

admiralty, reason for, 10.  
aliens, of suits between, 81.  
aliens and citizens, 81.  
amount in controversy, 49, 93, 123.  
ancillary:  
    what is, 82.  
    constructive service, 88.  
    examples at law, 89.  
    examples in equity, 90.  
    property in possession, 83.  
    potential possession, 83.  
    receivers, suits by, 83.  
    receivers, suits against, 92.  
    records and processes of the court, 87.  
    remedies to recover property, 86.  
appellate, divided between C. C. A. and Supreme Court, 414.  
appellate, of District Court, 48.  
citizenship, what to found, 65.  
citizenship, over, why vested, 10.  
classes, two great of, 12.  
conflicting; priority, 225.  
conformity act, no relation to, 39, 171.  
consent, over subject-matter, 62.  
constitutional catalogue of, 4.  
dismissal for want, 62.  
district courts, of, 48, 49.  
exclusive, when, 11.  
"extend," meaning of, 8.  
limited, but not inferior, 20.  
limited to sovereignty, 23.  
lost, by dismissal of separable controversy on removal, 136.  
original, meaning of, 49.



## INDEX

(References are to pages.)

### **JURISDICTION - Cont.**

original, removal is species,  
111.  
removal, dismissal of separa-  
ble controversy, ends, 126.  
removal, suit must be within  
original, 119.  
state a party, §1.  
statutory, in, 20.  
Supreme Court, original, 18.  
Supreme Court, appellate, 19,  
414.  
vested, not divested, 123.  
whole case, included in, 10.  
see Appeal and Error; Appel-  
late Procedure.

### **JURY,**

constitutional provisions, 179,  
326.  
challenges in civil cases, 183.  
composition of, 183.  
directed verdict, 183.  
directed verdict, both sides re-  
questing, 184.  
judgment non obstante, 184.  
serious and petty offenses, 326.  
verdict must be unanimous,  
183.  
waiver of, civil cases, 179.  
waiver, peculiar effect, 179.  
waiver, statutory, 181.  
waiver, in criminal cases, 327.  
see Criminal Law; Admiralty  
Procedure.

### **LAND GRANTS,**

jurisdiction over, 53.  
see Removal of Causes.

### **LAW,**

see Equity; Procedure at Law;  
Appeal and Error.

### **LEGISLATIVE POWER,**

excluded from judicial 4  
to regulate procedure, 163.

### **LIEN,**

suits to remove, publication,  
33.  
see Admiralty Jurisdiction;  
Publication.

### **LIMITATIONS, STATUTE OF,**

when federal court will fol-  
low, 194.

### **LIMITED,**

federal courts are, but not in-  
ferior, 20.

### **LOCAL ACTIONS,**

venue in, 32.  
what are, 33.

### **LOCAL INFLUENCE,**

see Removal of Causes.

### **LOCAL LAW,**

see Equity; Rules of Decision.

### **LOCAL PREJUDICE,**

see Removal of Causes.

### **MANDAMUS,**

to prevent remand, 146, 153.

### **MARITIME,**

see Admiralty Jurisdiction.

### **MASTERS IN CHANCERY,**

character and duties, 284.  
see Procedure in Equity.

### **MONOPOLIES,**

venue for suits for damages  
by, 26.

## INDEX.

(References are to pages.)

### MOOT CASES,

not in judicial power, 4.

### MOTION-DAY,

see Procedure in Equity.

### MOTION IN ARREST,

see Criminal Law.

### MOTION FOR NEW TRIAL,

see Procedure at Law; Criminal Law.

### MOTION FOR REHEARING,

see Procedure in Equity.

### MOTIVE,

for joinder of parties, 135.  
for transfer or removal, 75.

### MUNICIPAL CORPORATIONS,

citizenship, 66, 67.

### NATIONAL BANKS,

do not import federal question, 63.  
no attachment against, 63.  
no preliminary injunction in state court, 63.  
venue of suits, to enjoin Comptroller, 27.

### NECESSARY,

see Parties; Procedure in Equity.

### NE EXEAT,

see Procedure in Equity.

### NOMINAL,

see Parties; Procedure in Equity.

### OF COURSE,

as, see Procedure in Equity.

### OFFICERS,

aliens, suits by, removable, 159.  
arise, when suits, under constitution, etc., 64.  
Congress, of, may remove, 158.  
courts, of, may remove, 158.  
revenue, may remove, 158.  
removal, by, of actions, 112.

### OPENING PLEADING,

in patent, etc., cases must show federal question, 58.  
to show diversity, 80.  
to show constitutional arisal, 124.

### ORDER-BOOK,

see Procedure in Equity.

### PARTIES,

administrators, sue in own name, 239.  
admiralty, in, see Procedure in Admiralty.  
averment, false of citizenship, 125.  
class-suits, in, 240, 243.  
contract, persons with whom made, 239.  
corporation, in stockholders' suit, 73.  
default, affecting removal, 133.  
dispensable, under rule, 31, 249.  
dispensable, under statute, 29.  
electing to join, are joint, 78, 133.  
equity, in, 31, 237, 243.  
executors, sue in own name, 239.  
formal or nominal, 31, 73, 78, 126, 247.

## INDEX.

(References are to pages.)

### **PARTIES—Cont.**

incompetents as, 251.  
indispensable, 31, 243.  
intervening, cannot remove,  
130.  
intervention, 251.  
joinder of, in equity, 242.  
joinder, to prevent removal,  
133.  
at law, see Procedure at Law.  
necessary, 31, 128, 244.  
necessary, in separable controversy, 132.  
nominal, disregarded, 31, 73,  
78, 126, 247.  
objections for want of, 250.  
plaintiff in equity, 239.  
proper, meaning of, 245.  
real or nominal, 73, 247.  
real party in interest, 238.  
realignment of, 77, 78, 127, 128.  
removal, joinder in petition,  
129.  
removal, upon dropping, 122.  
separable controversy, only indispensable considered, 132.  
state as, 81, 126.  
stockholders' suits, 261.  
substituted, 79, 130.

### **PARTNERSHIP,**

as such, no citizenship, 73.

### **PATENT-RIGHT LAWS,**

arise, what cases, under, 15.  
exclusive jurisdiction, 11.  
venue of actions, 26.

### **PENALTIES AND FORFEITURES,**

admiralty jurisdiction, 370.  
of one country, not enforced abroad, 11, 118.  
exclusive jurisdiction, 11.

### **PENALTIES AND FORFEITURES—Cont.**

suits for, not removable, 118.  
venue of actions, 27.

### **PERJURY,**

see Criminal Law.

### **PERPETUATION OF TESTIMONY,**

proceedings for, 176.

### **PHYSICAL EXAMINATION,**

when permitted, 176.

### **"PLAINTIFF,"**

used collectively, 29.

### **POLITICAL QUESTIONS,**

excluded from judicial power,  
2.  
what are, 2.  
when justiciable, 3.

### **PREJUDICE, LOCAL,**

removal for, 113.

### **PRIZE,**

see Admiralty Jurisdiction.  
exclusive jurisdiction, 12.

### **PROBATE,**

of will, not suit, 117.

### **PROCEDURE IN ADMIRALTY,**

amendments, 408.  
answer, 401, 402.  
answer, method and content,  
405.  
appeals, extent of review, 411.  
appeals, proceedings for, 413.  
appearance, 396.  
bail, general and special, 394.  
bail, stipulations for, 392.  
claim and defense, 385.  
claim and intervention, 382.  
commissioners, trial by, 410.

## INDEX.

(References are to pages.)

### PROCEDURE IN ADMIRALTY —Cont.

consolidation of causes, 382.  
cross-libel, 406.  
default, and after proceedings,  
397.  
defendants, who made, 380.  
defendants, bringing in, 407.  
defense, methods of, 400.  
exceptions, 401.  
exceptions, requirements of,  
404.  
exceptive allegations, 401, 402.  
information, 389.  
interrogatories, 388, 406, 408.  
intervention, *pro interesse suo*,  
382.  
intervention, as party, 383.  
intervention, instances of, 384.  
joinder of causes, 381.  
jurisdiction, objections to, 403.  
jury, trial by, 409, 411.  
libel, requirements of, 386.  
plaintiff, joinder of, 379.  
plaintiff, legal title, 377.  
plaintiff, real party in interest,  
376.  
plaintiff, representation, 378.  
poor persons, 390.  
practice, liberal and untechnical,  
376.  
practice, whence derived, 375.  
process in *rem* or in *personam*, 391.  
*pro confesso*, decree, 397, 399.  
replications, 408.  
rules, adoption of, 165, 168.  
rules, chief source of practice,  
376.  
sale, of property, 393.  
security, stipulations for, 389,  
390.

### PROCEDURE IN ADMIRALTY —Cont.

set-off, 406.  
supplemental pleadings, 409.  
trial, by jury, 409, 411.  
trial, by commissioners, 410.  
trial, general method of, 409.  
venue, of actions, 26.

### PROCEDURE IN EQUITY,

adequate remedy at law involves mere transfer, 274.  
administrators, sue in own name, 239.  
affidavits, of expert witnesses, 281.  
affirmation, instead of oath, 297.  
amended and supplemental pleadings, 274.  
answer, content and method, 269.  
answer, one for all defenses, 268.  
bill, frame and content, 259.  
chambers, power of judge at, 236.  
class-suits, 240, 243.  
continuance, effect of, 283.  
counter-claims, two classes, 270.  
counter-claims, reply to, 273.  
decree, clerical errors, 291.  
decree, enforcement of, 291.  
decree, form of, 290.  
decree, *pro confesso*, 288, 289.  
defense, methods of, 264.  
definite, motion to make, 273.  
demurrers, and pleas abolished, 265.  
depositions, before examiner, 281.

## INDEX.

(References are to pages.)

### PROCEDURE IN EQUITY—

Cont.

depositions, rules as to taking, 279.  
dismiss, motion to, 266.  
dismiss, motion, setting down, 267.  
English Chancery, still residuary authority, 234.  
evidence, usually taken orally in court, 276.  
exceptions, to report of master, 286, 287.  
executors, sue in own name, 239.  
guardians, sue in own name, 239.  
impertinence or scandal, 273.  
incompetents, 251.  
injunctions, who may grant, 294.  
injunctions, three kinds, 295.  
injunctions, necessity for bond, 296.  
injunctions, necessity for notice, 295.  
injunctions, specific, must be, 296.  
interrogatories, discovery by, 276, 278.  
intervention, doctrine of, 251, et seq.  
joinder, of causes, 260.  
jurisdiction, objections to, over the person, 268.  
law, incidental matters of, 274.  
law, transfer to, side, 274.  
master, functions of, 284.  
master, effect of report, 284.  
master, exceptions to report, 286.  
master, proceedings before, 285.

### PROCEDURE IN EQUITY—

Cont.

master, reference to, unusual, 284.  
motion-days, 236.  
ne exeat, 297.  
notice of entries, 236.  
objecting to evidence, 276.  
of course, proceedings as, 235.  
orders, enforcement of, 291.  
parties, basic rules, 237.  
parties, administrator as, 239.  
parties, contracting in another's name, 239.  
parties, dispensing with, 249.  
parties, executors as, 239.  
parties, formal or nominal, 247.  
parties, guardians, 239.  
parties, incompetent, 251.  
parties, indispensable, 243.  
parties, intervention of, 251.  
parties, joinder of, 242.  
parties, plaintiffs, 238.  
parties, proper, 245.  
parties, necessary, 244.  
parties, objections for want of, 250.  
parties, real party in interest, 238.  
parties, representation, 239.  
parties, stockholders' suits, 261.  
parties, trustees, 239.  
process, 263.  
pro confesso, decree, 288.  
real party in interest, 238.  
rehearing, motion for, 291.  
representation, 239.  
reply, 273.  
restraining orders, 295.  
review, bill of, 293.  
rules, new equity, 168, 234.  
rules, local, 298.

## INDEX.

(References are to pages.)

### PROCEDURE IN EQUITY—

Cont.

signature to pleadings, 263.  
strike, motions to, 273.  
transcript, see Appellate Procedure.  
trial, usually before court, 276.  
trial, setting down for, 283.

### PROCEDURE AT LAW,

amendments, 173, 186.  
appearance, special, 171.  
appellate review, steps for, 172.  
arbitration, submission to, 182.  
attachment, state laws, 187.  
auditors, appointment of, 182.  
charge to jury, 170, 185.  
charge, exceptions to, 186.  
conformity act, 167, 174.  
conformity act, judge, 170.  
conformity act, jurisdiction, 171.  
conformity act, matters controlled, 172.  
conformity act, new trial, 171.  
conformity act, special verdict, 171.  
depositions, de bene esse, 175.  
depositions, under dedimus, 176.  
depositions, state laws, 176.  
depositions, taking of plaintiff before trial, 176.  
equitable defenses, 172.  
evidence, 174.  
evidence, state decisions, 175.  
execution, state laws, 188.  
execution, stay of, 188.  
jury, challenges, 183.  
jury, composition, 182.  
jury, trial by, 179.  
jury, statutory waiver, 181.

### PROCEDURE AT LAW—Cont.

jury, common law waiver, 179.  
legislature, power over, 163.  
new trial, 171, 188.  
physical examination, 176.  
production of documents, 178.  
proof, viva voce, 175.  
reference, 182.  
return of sheriff, not conclusive, 172.  
rules of court, 174.  
state laws, no effect, unless adopted, 164.  
subpoena duces tecum, 179.  
verdict, both sides asking for directed, 184.  
verdict, direction of, 183.  
verdict, judgment non, obstante veredicto, 184.  
verdict, special, 171.  
verdict, unanimous, 183.  
witnesses, competency, 174.  
witnesses, examination of, 177, 178.

### PROCESS,

sheriff's return not conclusive, 172.  
see Procedure in Admiralty; Procedure in Equity; Procedure at Law.

### PRODUCTION OF DOCUMENTS,

at law, see, 178.  
in equity, see Procedure in Equity.

### PRO INTERESSE SUO,

see Procedure in Equity; Intervention; Parties.

### PROPER,

see Parties; Procedure in Equity.

## INDEX.

(References are to pages.)

### PUBLICATION,

- suits to establish title, remove clouds, etc., 33.
- state statutes do not apply, 34.

### PUBLIC POLICY,

- of state, how followed, 203.

### QUO WARRANTO,

- when suit for removal, 119.

### RAILROADS,

- federal, do not make federal question, 63.

### REAL,

- federal question must be, 62, 125, 426.
- see Parties.

### REALIGNMENT,

- of parties, see Citizenship; Parties; Removal of Causes.

### RECEIVERS,

- appointing, not final judgment, 445.
- citizenship, when stand on own, 75.
- of federal corporations, 64.
- suits by or against, 85, 92.
- territorial powers, 38, 39.
- see Procedure in Equity; Appeal and Error.

### REFERENCE,

- trial by, 182.
- in equity, unusual, 284.

### REMAND,

- in removal, 125, 155.

### REMOVAL OF CAUSES,

- aliens, removal by, 127.
- aliens, local prejudice, 145.
- aliens, separable controversy, 130.
- aliens, suits against officers, 113, 159.

### REMOVAL OF CAUSES—Cont.

- amendment, right created by, 122.
- amendment, of petition for, 145.
- amount in controversy, 121.
- amount, reducing, 123.
- amount, counterclaims, 123.
- amount, freight claims, 121.
- answer, creates no separable controversy, 132.
- appeal, from order of remand, 146, 153.
- appearance, not general in, 148.
- attachment, preserved on, 147.
- bond for required, 137.
- catalogue, of instances, 112.
- civil, action must be, 118.
- civil rights cases, 112, 155.
- Congress, officers of, 112, 158.
- constitution, etc., arising under, 112, 124, 125.
- counterclaim, whether suit, 115.
- counterclaim, amount, as affecting, 123.
- courts, officers of, 112, 158.
- criminal cases, 157.
- default, effect of, 133.
- dismissal, after, effect, 148.
- diverse citizenship cases, 113.
- diverse citizenship, time existing, 122, 126.
- diverse citizenship, immaterial in federal question, 125.
- diverse citizenship, false averments, to prevent, 129.
- effect of, 148, 146.
- employers' liability cases, not subject to removal, 126.
- final, order of remand not, 444.

## INDEX.

(References are to pages.)

### REMOVAL OF CAUSES—Cont.

fraudulent joinder to prevent, 133.  
freight claims, amount, 121.  
grants of land from different states, 113, 159.  
intervention, not suit, 116.  
intervening, parties, no right, 130.  
judicial notice of federal charter, 125.  
judicial proceeding required, 116.  
law and equity, blending may prevent, 147.  
local influence, 113, 148, 154.  
mandamus, none to prevent remand, 146.  
nature of proceeding, for, 111.  
notice of application, 144, 145.  
original jurisdiction, within, 119.  
parties, to application for, 128, 153.  
parties, electing to join, joint, 133.  
parties, fraudulent joinder, 133.  
parties, indispensable only, to be in separable controversy, 132.  
parties, intervening or substituted, 130.  
parties, necessary, in, 128.  
parties, nominal, 126.  
parties, realignment of, 127.  
peculiar proceedings, 120.  
petition, for, 129, 137, 138.  
prejudice, and local influence, 113, 149.  
prerogative proceedings, 121.  
probate proceedings, 117.

### REMOVAL OF CAUSES—Cont.

quo warranto, 119.  
realignment of parties, 127.  
remand, duty to, 146, 155, 144, 125.  
repleader, in, 147.  
revenue laws, 112, 158.  
scire facias, 116.  
separable controversy, 113, 130.  
separable controversy, removes suit, 135.  
separable controversy, residents cannot remove, 125.  
separable controversy, effect of dismissing, 136.  
separable controversy, local prejudice, 149.  
state court may decide what, 138.  
state court, jurisdiction ceases, 139.  
state, right to restrict, 160.  
suit only, subject to, 114, 120.  
suit, to have own identity, 115.  
tax-proceedings, 116.  
time for application, 141, 143.  
transcript, filing, 144.  
venue of proceedings, 123.  
waiver, restores state jurisdiction, 139.  
will-contests, 117.

### REVIEW OF STATE COURTS.

allowance, of writ of error, 513, 515, 517.  
assignment of errors, 515.  
assignment of errors, cannot raise federal question, 504.  
"authority," meaning of, 509.  
bond, 517.  
certiorari—reasons for, 510.  
certiorari, method of, 521.



## INDEX.

(References are to pages.)

### REVIEW OF STATE COURTS

—Cont.

certiorari, statutes, 492.  
certificate, by state court, 504.  
changes, recent in law, 493.  
citation, 516.  
controlling, federal question, 506.  
“drawn in question,” 498, 501.  
error, allowance necessary, 513.  
error, allowed by whom, 517.  
error, directed to what court, 518.  
error, effect and scope of, 506.  
error, summary of procedure, 519.  
evidence, review of, 507.  
federal question, assignments of error, raising by, 504.  
federal question, reference to constitution must be plain, 504.  
federal question, certificate of state court, 504.  
federal question, must be decided, 506.  
federal question, “drawn in question,” 498.  
federal question, how raised generally, 503.  
federal question, must be controlling, 506.  
federal question, must be real, 505.  
federal question, raised on rehearing, 502.  
final judgments, 494.  
highest state court, 496.  
limitations, statute of, 512, 517.  
petition for writ of error, 514.  
petition for certiorari, 521.

### REVIEW OF STATE COURTS

—Cont.

procedure, conforms generally to federal practice, 511.  
procedure, statutory provisions, 512.  
procedure, to obtain error, 519.  
procedure, to a certiorari, 521.  
real, federal question, 505.  
rehearing, motion for, 502.  
“specially set up,” 498, 501, 502.  
statutory provision for, 492.  
summary for writ of error, 519.  
summons and severance, 514.  
supersedeas, 517.  
time, limitations, 512, 517.  
transcript, 519.  
“validity,” meaning of, 508.

### RULES OF COURT,

in admiralty procedure, 168, 376.  
basis of power to enact, 165.  
binding, how far, 165.  
conformity act, effect under, 174.  
copyright cases, 168.  
equity rules, 168, 234.  
general orders in bankruptcy, 168.  
law cases, 167.  
see Procedure at Law; Procedure in Admiralty; Procedure in Equity; Appellate Procedure.

### RULES OF DECISION,

at law, 190.  
conflict between state and federal courts, 195.  
construction of federal laws, 192.

## INDEX.

(References are to pages.)

### **RULES OF DECISION—Cont.**

costs, state statutes respecting, 194.  
established, when construction, 200.  
evidence, state laws, 194.  
frauds, state statute of, 194.  
general jurisprudence, 193, 201.  
laws, state decisions not, 195.  
limitations, state statutes, 194.  
local law, 193.  
local property, 199.  
local property, settled decisions, 201.  
local property, rules of, 202.  
R. S. 721, effect of, 194.  
state decisions, 195.  
state statutes, 193.  
state statutes, how far state construction followed, 197.  
see Equity Jurisdiction.

### **SCIRE FACIAS,**

whether suit, 116.

### **SEARCHES AND SEIZURES,**

see Criminal Law.

### **SEIZURES,**

exclusive jurisdiction, 12.

### **SELF-INCRIMINATION,**

see Criminal Law.

### **SEPARABLE CONTROVERSY,**

see Removal of Causes.

### **SEPARATION OF POWERS,**

under the constitution, 4.

### **STATE,**

admiralty, legislative power, 355.  
against, when suit is, 5.  
between, suits and another state, 3.

### **STATE—Cont.**

citizen, is not, 66, 67, 126.  
comity between, and federal courts, 83.  
comity, see Equity Jurisdiction.  
district courts, jurisdiction, 80, 81.  
exclusive jurisdiction, over, 12.  
federal courts, cannot control, 164.  
grants from different, 113, 159.  
immunity from suit, 5.  
real party, when, 126.  
removals, restricting, 160.  
Supreme Court, jurisdiction, 19.

### **SUBJECT-MATTER,**

consent confers no jurisdiction, 62.

### **STOCKHOLDERS' SUITS,**

citizenship in, 73.  
see Procedure in Equity.

### **SUBPOENA DUCES TECUM,**

runs to party, 179.

### **SUBSTITUTION,**

see Parties; Removal of Causes; Citizenship.

### **"SUIT,"**

meaning of term, 115, 116.  
only, can be removed, 114.

### **SUMMONS AND SEVERANCE,**

see Appellate Procedure; Review of State Courts.

### **SUPREME COURT,**

appellate jurisdiction, 19, 414.  
original jurisdiction, 18.  
orders in bankruptcy, 168.  
rules in admiralty, 168, 376.  
rules in copyright cases, 168.  
rules in equity, 168.

## INDEX.

(References are to pages.)

### SUPREME COURT—Cont.

- rules, power to enact, 165.
- rules, power to prescribe for law cases, 167.
- states, courts of, bound to follow interpretation of federal laws, 192.

### TAX ASSESSMENTS,

- whether removable, 116.

### TAXES, INTERNAL REVENUE,

- suits to recover, venue, 27.

### TERRITORY,

- see Citizenship.

### TRANSFER,

- between divisions, 37.
- motive of real, is immaterial, 75.
- see Assignments.

### TREATY,

- cases arising under, 57.
- validity of, 508.
- see Appeal and Error; Review of State Courts.

### TRUSTEES,

- board of, no citizenship, 73.
- citizenship, when stand on own, 75.
- of express trust, 239.

### "VALIDITY,"

- meaning of, 508.

### VENUE OF ACTIONS,

- admiralty cases, 26.
- ancillary proceedings, 27.
- aliens, against, 26.
- bonds of contractors, 27.
- citizenship, based on, 25.
- Comptroller of Currency, 27.
- copyright cases, 26.
- criminal cases, see Criminal Law.

### VENUE OF ACTIONS—Cont.

- damages for monopoly, 26.
- employers' liability, 27.
- enjoining I. C. C. orders, 27.
- federal question, 25.
- inhabitants, bias of, no change for, 37.
- infringement suits, 26.
- internal revenue taxes, 27.
- local actions, 32.
- penalties, 27.
- "plaintiff" and "defendant," 29.
- removal of causes, 155, 123.
- several defendants, 26, 29.
- waiver, 28, 123.

### VERDICT,

- criminal cases, 341.
- directing, 183.
- direction, both sides requesting, 184.
- judgment non obstante, 184.
- special, under conformity act, 171.
- unanimous, required, 183.

### WHOLE CASE,

- when jurisdiction over, 10.

### WILLS,

- probate of, not suit, 117.
- proceedings to contest are suit, 117.

### WITNESSES,

- competency at law, see Procedure at Law.
- competency, in criminal cases, see Criminal Law.
- method of examining, see Procedure at Law; Criminal Law.
- whence summoned, 38.















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